Navigating the Adverse Action Process Pursuant to the FCRA

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Navigating the Adverse Action Process

The federal Fair Credit Reporting Act (FCRA) imposes several obligations on users of consumer reports that are procured for employment purposes.[1] One such obligation is the requirement to engage in what is known as the "adverse action process." Under this required process, employers must follow certain key steps prior to taking an adverse employment action against a consumer based either in whole or in part on the contents of a consumer report. Adverse actions include any action that would have a negative impact on the consumer, including denial of employment, termination, refusal to promote, etc.

The key steps of the adverse action process and additional information for employers to consider are summarized here and further detailed below:

- First, employers should provide a pre-adverse action notice before deciding to take an adverse action against the consumer.
    - Include a copy of the consumer report and a copy of *A Summary of Your Rights Under the FCRA* with the pre-adverse action notice.
- Wait a reasonable amount of time before taking the adverse employment action.
- Upon taking adverse action, provide the consumer with an adverse action notice.
- Take into consideration:
    - Employers who contract with third parties to deliver adverse action notices remain responsible to consumers if the notices are not provided.
    - Improper use of pass/fail grading matrices may invite allegations that employers have collapsed the adverse action process or have created unlawfully discriminatory policies.
    - Employers must know the differences between FCRA and state fair chance law requirements.

Providing the Pre-Adverse Action Notice

1. When to send the pre-adverse action notice:

The first step to fulfilling the FCRA-required adverse action process is to provide the consumer with a notice known as the "pre-adverse action notice." This notice must be sent before the employer ***decides*** to take an adverse action against the consumer,[2] as opposed to before the employer ***actually takes*** the adverse action. For example, the employer should not make the decision to fire an employee based on the contents of his consumer report and then subsequentially send the pre-adverse action notice to the employee. Instead, the employer should wait to make the decision to take adverse action until after the pre-adverse action notice is provided to the employee and a reasonable amount of time has passed as further described below.

[1] 15 U.S.C. § 1681(b)(a)(3)(b).
[2] The terms "consumer," "applicant," and "employee" will be used interchangeably.

2. Information the pre-adverse action notice should include:

The FCRA doesn't prescribe the exact language that must be stated within the body of the pre-adverse action notice. Standard notices typically state that the employer "may take adverse action based either in whole or in part upon a consumer report obtained about [the consumer]" along with information about how to dispute the accuracy of the consumer's report. The law does, however, require employers to include with the notice (1) a copy of the consumer report and (2) a copy of the document published by the Consumer Financial Protection Bureau (the "CFPB") titled "A Summary of Your Rights Under the FCRA."[3]

3. Waiting a reasonable amount of time:

Again, the FCRA lacks specifics about exactly how long an employer must wait after sending a pre-adverse action notice before moving on to the next step of the process. Instead, it only requires employers to wait a "reasonable amount of time" after sending the initial notice before taking the adverse action. The FTC has stated that five (5) business days is probably a reasonable amount of time, which has since become the industry standard.[4] However, employers should consider the purpose of the process when deciding what a reasonable amount of time is and ensure there is enough time to allow the employee to either (1) dispute the accuracy of the contents of his consumer report or (2) provide the employer with mitigation[5] or rehabilitation[6] evidence. Employers might think of this time as a quasi-due process period for consumers.

The "reasonableness" of a time period will largely depend on the unique circumstances involved for each consumer. Take, for example, an employer that receives a consumer report containing potentially disqualifying information that is able to hand-deliver the pre-adverse action notice with required attachments to the consumer. If the consumer carefully reviews the notice, his consumer report, and his Summary of Rights and does not wish to dispute the contents of the report or provide any mitigation or rehabilitation evidence, the employer may be in a position to reasonably proceed with the adverse action immediately thereafter. However, if an employer provides the notice by US mail, it would probably be wise to allow ***several business days*** (at least five) for the consumer to receive the notice and take his desired course of action before the employer proceeds in taking the adverse action.

Providing the Adverse Action Notice

After waiting a reasonable amount of time required during the pre-adverse action stage, the employer may wish to move on to the adverse action stage of the process. Upon taking the adverse action against the consumer, the employer must provide the consumer with an additional notice known as the "adverse action notice." Adverse action notices may be provided either orally or in writing, but the latter option is always recommended.[7]

The adverse action notice must include:

1. the name, address, and phone number of the consumer reporting agency (CRA) that supplied the consumer report to the employer;
2. a statement that the CRA did not make the decision to take adverse action against the consumer and therefore is unable to provide specific reasons for the decision; and
3. notice of the rights to obtain a full file disclosure from the CRA and to dispute the accuracy or completeness of any information included in the consumer report.[8]

[3] 15 U.S.C. § 1681(b)(b)(3).
[4] Five business days has become custom in the industry; however, this is not written in stone. There could very well be circumstances where an employer needs to give the pre-adverse action letter more time to get to the applicant and to allow the applicant sufficient time to review it and initiate a dispute, if necessary. See, 40 Years of Experience with the Fair Credit Reporting Act, an FTC Staff Report with Summary of Interpretations, at p. 52 (July 2011).
[5] Mitigation evidence is evidence contemporaneous with the commission of a crime that tends to - in the mind of a reasonable person - make the fact of committing the crime not as "bad" as it would otherwise be considered to be.
[6] Rehabilitation evidence is evidence subsequent to conviction of the crime that tends to show the convict has sought to make amends and improve herself.
[7] Pre-adverse action notices must always be provided in writing.
[8] 15 U.S.C. § 1681(m)(b)(3).

The FCRA does not require employers to state the specific conviction or other reason for taking the adverse action based on the consumer report, unlike some state laws.

Additional Considerations

1. Contracting with a CRA to provide pre-adverse and adverse action notices:

Employers may utilize third parties, such as CRAs, to provide consumers with the adverse action notices required under the FCRA. However, employers should be aware that their adverse action duties are non-delegable. This means that employers cannot avoid liability to consumers simply by contracting these services out to a third-party CRA. Employers are always responsible for facilitating the "due process" required to take place within the adverse-action process.

2. Hidden dangers associated with grading consumer reports:

Many employers request their CRAs to provide a service commonly known as "grading," in which the CRA will mark up a consumer report according to the employer's matrix for easy review. A matrix is used to identify those types of crimes for which a conviction would disqualify an applicant from employment. Though this service is typically requested simply as a function of convenience, there are a few possible pitfalls within the grading process. Employers may be tempted to use black and white labels such as "eligible" v. "ineligible" or "compliant v. "non-compliant" to identify disqualifying convictions on a consumer report. These phrases essentially create pass/fail matrices, and one of two things could easily go wrong here.

a. Collapsing the adverse action process.

First, unless the employer is exceedingly careful not to let these preliminary designations become the actual final decisions, it may be held liable for violating the FCRA by collapsing the adverse action process. Consumers may complain that the bright-line labels cause employers to circumvent the adverse action process and that the decision to take the adverse action is actually made when the report is graded, all of which deny consumers the right to dispute or otherwise explain the convictions listed in their consumer reports.[9]

Using straight-forward "yes or no" labels to grade reports doesn't necessarily mean that the employer intends to circumvent the adverse action process, but it does give the unnecessary appearance of the intention to do so. To avoid the appearance of ignoring the FCRA's requirement, it is suggested that employers use terms that signify that the evaluation of the report (and any potential adverse action) has yet to occur, e.g., "review" or "needs careful review." These terms may better illustrate the employer's intention for the labels to serve as a signal for the HR person to begin the adverse action process, rather than as an excuse to skip it. A wise employer will also state in its Background Screening Policy that its decision-making personnel must never render a decision based upon the matrix itself. A decision should only occur after the consumer has been provided with ample opportunity to dispute or explain the contents of his consumer report. Put differently, grading can be used as a shortcut for not reviewing reports that ***do not*** need to be reviewed (i.e., the "all clears") – it should never be used as a shortcut to not review reports that ***should be*** reviewed.

[9] This ties back to the recommendation to send the pre-adverse action notice before, and not after, the **decision** to take an adverse action is made.

b. Allegations of disparate impact.

Additionally, pass/fail grading matrices may pave the way for applicants to claim that the employer's hiring practices are racially discriminatory due to the disparate impact on racial minorities.[10] For example, it is commonly theorized that hiring policies that automatically disqualify applicants with convictions involving the illegal use or possession of marijuana have a disparate impact on black and Latino applicants. Fair chance activists further argue that, because individuals of such races have been disproportionately arrested and convicted of crimes involving marijuana, employment policies with zero-tolerance for convictions involving illegal drugs will likewise disproportionally disadvantage these racial minorities. This is especially true when the policy leaves no opportunity for individualized assessment, such as the case in a pass/fail grading matrix.

Instead of having blanket zero-tolerance policies that require automatic disqualification for certain convictions, fair chance activists (as well as some state laws) demand that employers consider other relevant information, such as:

1. the amount of time passed since the conviction occurred;
2. the age of the individual when he was convicted; and
3. the nature of the job in question in relation to the conviction.

Clearly, employers who flag drug convictions as "review," rather than "ineligible," will likely be able to more easily prove that their grading is merely a preliminary process that leaves room for future individualized assessment and the consumer's due process afforded to them by the FCRA.

3. FCRA Notices v. Fair Chance Law Notices

Notices required by the FCRA and notices required by state fair chance laws (or "ban-the-box laws") may have similar purposes and requirements, but they are not one in the same. This means that employers cannot substitute the requirements of one state law to satisfy requirements of the FCRA, and vice versa. Take California's Fair Chance Act for example.[11] Under this state law, California employers must provide applicants with a notice that specifically states which conviction(s) disqualifies them from employment - a requirement not present in the FCRA. Final notices under California law must also provide applicants with information requiring any procedures available to challenge the final disqualification and their rights to file a complaint with the state's Department of Fair Housing and Employment, unlike notices provided under the FCRA.

Though these laws don't typically prohibit the employer from sending FCRA notices & state notices in the same communication to the consumer, the specific information that must be contained in notices like California's prevent employers from legally being able to use a one-size-fits all notice to send out to every disqualified applicant.

[10] See the joint publication by the FTC and the EEOC titled "Background Checks – What Employers Need to Know."
[11] California AB 1008.

Conclusion

When it comes to acting on the contents of consumer reports, there are many potential pitfalls for the unwary employer. Prudent employers are well advised to engage employment counsel to create a safe and compliant adverse action process. The consumer report is a powerful tool, but it comes with responsibility.