

When the Background Report Is Not Good:

An Employer's Guide To Adverse Action

Under the U.S. Fair Credit Reporting Act



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Most often when an employer receives a completed background report from their background screening partner, the results are “good” or “clear,” meaning no potentially disqualifying information is reported. The background report confirms the history, qualifications, and experience as presented by the candidate and the employer moves forward with their planned employment action, such as hiring a candidate or promoting an employee. It is the desired outcome for all parties – the candidate seeking employment or promotion, the manager waiting for a valuable employee, and for HR.



Sometimes, however, the background report contains potentially disqualifying information. What happens then? The purpose of this whitepaper is to explain legal responsibilities under U.S. federal law for employers and their background screening partner when a background report includes potentially disqualifying information. And, it addresses procedures to help create the best possible outcome in such a situation.

The U.S. Federal [Fair Credit Reporting Act](#) (FCRA), 15 U.S.C. 1681 et seq. governs the procurement, preparation, and use of consumer reports for employment purposes. Although other laws and regulations sometimes come into play (and are mentioned later in this whitepaper), the FCRA is the most impactful. The requirements discussed here apply to background reports prepared by a third-party background screening company for an employer for employment purposes. As interpreted by the U.S. Federal Trade Commission, employment purposes under the FCRA extend beyond just hiring and include actions such as promoting, demoting, and retaining. It also covers non-traditional employment situations such as independent contractors and temporary workers.

The process of dealing with potentially disqualifying information in a background report as part of an employment decision is referred to as “Adverse Action” under the FCRA. Simply stated, the purpose

U.S. Federal [Fair Credit Reporting Act](#), 15 U.S.C. 1681 et seq. governs the procurement, preparation and use of consumer reports.

of adverse action is to ensure a candidate for employment has the opportunity to dispute and correct information in a background report before a final employment decision is made. Adverse action is one of the most important consumer protections found in the FCRA, is rigorously enforced by government regulators, and is frequently the basis for litigation by Plaintiff's Bar.

A NOTE ABOUT EEOC GUIDANCE

In April of 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued [guidance](#) on the use of criminal records in employment decisions. This guidance does not have the force of law or regulation; however, the EEOC continues to aggressively pursue employers who allegedly have blanket policies of disqualifying candidates based on prior criminal history.

[EEOC Enforcement Guidance](#)

Consideration of Arrest and Conviction Records in Employment Decisions
Under Title VII of the Civil Rights Act of 1964

When considering a candidate with a prior criminal history, such as is sometimes found in a background report, the EEOC has recommended employers conduct an "individualized assessment." This assessment process should include three factors:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

Although the FCRA is silent on how employers should evaluate adverse information, such as criminal history in a background report, many employers have incorporated individualized assessment in their adverse action process. This paper recognizes individualized assessment may be a step in the overall adverse action process, but does not provide information on individualized assessment itself.

PROTECTING YOUR INVESTMENT

As an employer, you invest considerable time and money to identify your top candidate. Most likely you began with a pool of candidates, narrowed the pool based on experience and qualifications, interviewed finalist candidates at least once and, more likely, multiple times, and involved more than one person. After completing all the qualifying activity, you extended a contingent offer, disclosed to the candidate that a background check would be conducted, and obtained his/her authorization for that background check.



If the background check returns potentially disqualifying information about the candidate, you should not – and legally cannot – simply go back to square one and start over with the next candidate. Of course, no one is suggesting you hire an unqualified or dishonest candidate. Do not assume, however, that “potentially disqualifying information” is the same as “disqualifying information.” To make such an assumption would place you at the wrong end of legal compliance and waste the investment you have made thus far.

Before making a final employment decision, per the FCRA, you must provide the candidate an opportunity to dispute and correct information in the background report. And, as noted above, the EEOC advises employers to conduct individualized assessment prior to making a final decision.

OPPORTUNITY TO DISPUTE AND CORRECT

Why should information in a background report ever warrant correction? Background screening companies put forth enormous effort to ensure the accuracy of all information they report. Sometimes, however, the information at the source is incorrect or incomplete. In the case of criminal records, for example, expunged records may still appear in court records and databases, original charges may not have been updated with amended charges, or a felony charge may remain part of the record even though the charge was reduced to a misdemeanor. Records may contain incorrect names, misspelled names, or errors in dates of birth. Keep in mind these records are created and maintained by people – people who sometimes make errors and who often have more work on their plate than is easily managed.

Potentially disqualifying information is not limited to criminal records. An academic institution may refuse to verify a degree because the former student, unbeknownst to him/her, has an unpaid fine.

Employment dates may seem incorrect because a candidate worked first as an independent contractor, rather than a regular employee. Credit reports, although provided by one of the big three credit bureaus, are notoriously prone to error.

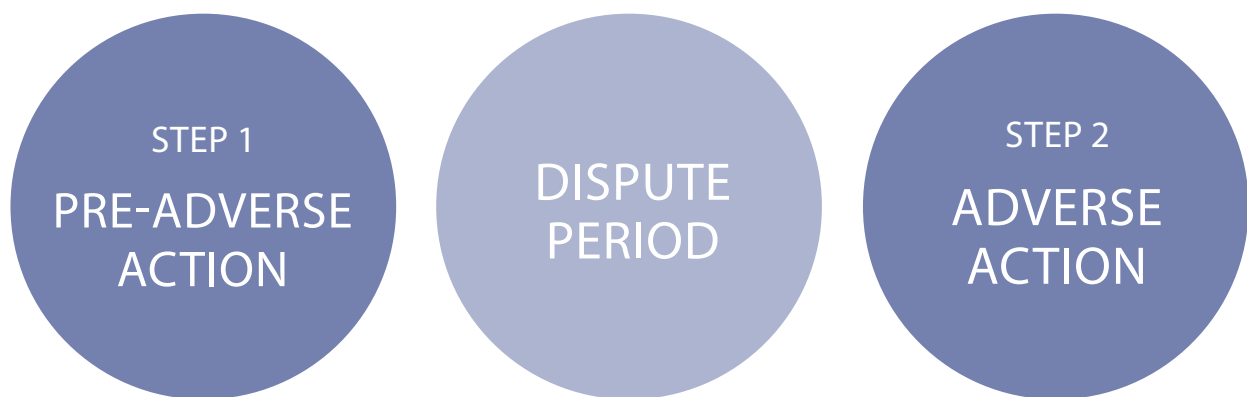
Background reports may warrant correction because source records are sometimes incorrect or incomplete.

Recognizing the imperfect nature of information and seeking to prevent a candidate for employment from being unjustly disqualified, the FCRA includes the adverse action process. (And even when accurate, the EEOC strongly recommends individualized assessment be conducted.) Employers who disregard adverse action requirements risk litigation from an increasingly aggressive plaintiff's bar, enforcement actions from government regulators like the EEOC, and loss of a good employee.

FEDERAL FCRA ADVERSE ACTION REQUIREMENTS

When considering disqualifying a candidate for employment based on information in a background report provided by a background screening company, the employer must follow a two-step adverse action process. Those two steps are detailed below and include, among other things, providing two separate notices to the candidate if adverse action is actually taken.

Samples of each notice are provided at the end of this whitepaper.



STEP 1: PRE-ADVERSE ACTION

Generally referred to as “pre-adverse action,” the purpose of the first notice is to advise the candidate of the possibility of an adverse decision and to provide the candidate the opportunity to dispute information in the background report. Specifically, the employer must:

- Inform the candidate an adverse employment decision is possible based in whole or part on information in the background report.
- Provide the candidate with a copy of the background report and a document entitled, “A Summary of Your Rights under the Fair Credit Reporting Act,” as prepared by the U.S. Consumer Financial Protection Bureau. (Additional state notices may also be required.)
- Inform the candidate of his/her right to dispute information in the background report prior to a decision being made.
- Inform the candidate of the time period to initiate a dispute.



Although not required under the FCRA, it is common practice to provide the pre-adverse notice in writing and to include the following points (some of which are required as noted above):

- Clearly state a decision has not been made.
- Inform the candidate an adverse decision is possible based in whole or part on information in the background report.
- Inform the candidate of his/her right to dispute information in the background report and to contact the background screening company or the employer to initiate such a dispute.
- The time period during which the candidate may initiate the dispute
- Contact information for the background screening company, including a toll free number.

- A statement that the background screening company has no role in the decision-making process and cannot explain the reason for the potential disqualification.

If the potentially adverse information is criminal in nature, the employer may wish to include in the notice:

- A statement informing the candidate of his/her opportunity for “individualized assessment” and to contact the employer if such an assessment is desired.

The FCRA provides the following regarding this step in the process.

FCRA Excerpt

604(b) Conditions for Furnishing and Using Consumer Reports for Employment Purposes.

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates –

- (i) a copy of the report; and
- (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(3).

THE DISPUTE PERIOD

The FCRA does not specify the number of days an employer must wait when giving the candidate time to initiate a dispute, saying only that the opportunity for dispute must be given “before taking any adverse action based in whole or in part on the report.” In response to many questions on the proper amount of time to initiate a dispute, the U.S. Federal Trade Commission (FTC) in a June 27, 1997 opinion letter suggested waiting five days as reasonable.

U.S. Federal Trade Commission

“... the clear purpose of the [adverse action] provision [is] to allow consumers to discuss reports with employers or otherwise respond BEFORE adverse action is taken.”

(Emphasis added.)

In addition and perhaps more meaningful for employers, is the statement shown at right on the purpose of adverse action, which the FTC included in several [opinion letters](#) interpreting the FCRA.

If the candidate contacts either the employer or background screening company to dispute information in the background report, the background screening company will begin a re-investigation of the disputed information. This re-investigation is required under the FCRA and will be conducted at no charge to the candidate and the employer.



The background screening company will keep the employer and the candidate informed as the re-investigation proceeds. Once re-investigation is completed, the screening company will inform both parties and provide an updated background report. Sometimes the re-investigation will result in the removal of the potentially adverse information. In the absence of adverse information, usually the employer no longer considers an adverse decision and proceeds with the hiring activity. No further action is needed to close the adverse action process.

In some cases, however, the employer will make the decision to take an adverse employment action. Typically this occurs when:

- The candidate does not contact the screening company or the employer to initiate a dispute and the dispute period elapses,
- The candidates disputes, but the content of the background report does not change,
- The candidate declines to participate in an individualized assessment, or
- The employer determines through the individualized assessment process that the candidate is not a good fit for the position.

STEP 2: ADVERSE ACTION

If the employer makes an adverse employment decision after the pre-adverse process has been completed, the employer must:

- Provide oral, written, or electronic notice to the candidate informing the candidate of the following:
 - Adverse employment action is being taken
- Contact information for the background screening company, including name, address, and toll free number

- A statement that background screening company did not make the adverse decision and cannot provide reasons for the adverse action
- The candidate's right to obtain a free copy of the background report within 60 days
- The candidate's continuing right to dispute the accuracy or completeness of report

Although not required under the FCRA, it is common practice to:

- Provide the adverse action notice in writing
- In addition to the requirements described above, include the following points:
 - Explain that a pre-adverse notice was previously sent, along with a copy of the background report and a summary of rights. (The FTC suggested providing this explanation to help avoid confusion on the part of the candidate as to why a second notice is being provided.)
 - State that the candidate had the opportunity to dispute the background report content, but did not do so
 - If the pre-adverse notice included information about individualized assessment, reference that fact in this second notice.

The FCRA provides the following regarding this second step in the adverse action process.

FCRA Excerpt

615. Requirements on users of consumer reports

- (a) Duties of users taking adverse actions on the basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall
 - (1) provide oral, written, or electronic notice of the adverse action to the consumer;
 - ...
 - (3) provide to the consumer orally, in writing, or electronically
 - (A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains

(continued on next page)

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- files on consumers on a nationwide basis) that furnished the report to the person; and
- (B) A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
- (4) provide to the consumer an oral, written, or electronic notice of the consumer's right
 - (A) to obtain, under section 612 [§ 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (3), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
 - (B) to dispute, under section 611 [§ 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

RESPONSIBILITIES

Per the FCRA, the employer is solely responsible for making employment decisions and complying with adverse action requirements. The employer may, however, outsource the administration of the adverse action process to their background screening provider. In practice, this means the background screening company would prepare and send pre-adverse and adverse action notices, but only when so directed by their employer client. The background screening company cannot participate in or make employment decisions on behalf of the employer.

Employers may outsource adverse action administration to a background screening company, but cannot outsource decision-making.

The background screening company is responsible for re-investigating anytime a candidate disputes the accuracy or completeness of information in the background report, directly or indirectly. The screening company is also responsible for informing the employer and candidate of the re-investigation, advising both parties of the result of the re-investigation, and providing an updated copy of the background report to both parties.

RE-INVESTIGATION AND TIMING

The timeframe provided in the pre-adverse notice, such as five days, is the time the candidate has to initiate a dispute. It is not the time the background screening company has to conduct the re-investigation.

Recognizing the importance of the re-investigation to the employer and candidate, the screening company will conduct the re-investigation as quickly as possible and many times the re-investigation will be completed in just a few days. In other cases, however, the re-investigation will require more than a few days because a record must be de-archived or a source does not respond promptly. The background screening company will keep both the employer and candidate informed as the re-investigation proceeds.



The FCRA gives the background screening company 30 days (or 45 days as explained below) to conduct the re-investigation. If the screening company, within 30 days, cannot confirm the accuracy of the information as originally reported, they must remove the disputed information from the background report.

The FCRA increases the re-investigation time from 30 to 45 days for the screening company if the candidate provides additional information prior to the end of the 30 days. For example, the candidate may obtain a copy of an expungement order and provide it to the screening company on day 25 of the 30-day re-investigation period. The FCRA then extends the re-investigation time to a total of 45 days, allowing the screening company time to verify the new information (in this example, the expungement order).

The background screening company has specific responsibilities following completion of the re-investigation. Among them, the screening company must:

- Within five days of completing the re-investigation, inform the candidate in writing by U.S. mail of the results of the re-investigation
- Provide a copy of the revised background report.
- Inform the candidate of his/her right to add a statement to the background report if s/he disagrees with content.

- Advise the candidate of his/her additional rights such as a written explanation of the re-investigation process.

Note: The “re-investigation completed” notice requirement is waived if the screening company completes the re-investigation within three business days.

The background screening company will also inform the employer of the results of the re-investigation and provide an updated background report.

TIMING OF THE EMPLOYMENT DECISION

Employers sometimes ask whether they must wait and hold a position open throughout the entire re-investigation period. Unfortunately, the FCRA is silent on that point. When evaluating timing of a decision, employers may wish to consider the intent of the adverse action process as described by the FTC and noted earlier in this document.

“... the clear purpose of the [adverse action] provision [is] to allow consumers to discuss reports with employers or otherwise respond BEFORE adverse action is taken.” (Emphasis added.)

Thirty days is, of course, a considerable period of time to hold a position open. From a practical perspective, however, the time to re-engage in the selection process, identify another finalist candidate, and qualify that candidate may also be considerable.

How long must an employer hold a position open?

BEYOND THE FEDERAL FCRA

Other laws may impact an employer’s adverse action process, including “Ban the Box” laws and ordinances, as well as other employment laws. Generally, these laws add requirements such as:

- Requiring the employer identify the specific criminal information that may disqualify a candidate,
- Explaining the process used to evaluate the criminal history in relation to the position being filled,
- Specifying a certain number of days during which the candidate may initiate a dispute,

- Requiring a special notice is provided.

Employers should consult with legal counsel regarding special requirements applicable to their city and state.

Note Regarding Ban the Box: In its simplest form, ban the box laws required the question about criminal history – and the “yes/no” box that followed – be removed from employment applications. Some ban the box laws have expanded beyond that basic premise and now impact, among other things, adverse action processes.

LESSONS LEARNED

FCRA-based class action litigation has, unfortunately, become common place in the past five years and failure to properly conduct adverse action is frequently alleged. Because the vast majority of these cases settle out of court, there is little case law to guide employers in developing adverse action processes. The alleged violations and court rulings on a variety of motions, however, offer some ideas for consideration by employers.

- Regarding the number of days a candidate has to initiate a dispute, consider starting the count based on when the candidate receives (or is estimated to have received) the pre-adverse notice. As an example, consider the reality of an employer allowing five days for a candidate to initiate a dispute when the pre-adverse notice is mailed on Day 1 and received by the candidate on Day 4. Limiting the opportunity to initiate a dispute to one day may not be viewed as complying with the intent of adverse action under the FCRA.
- Whether the candidate contacts the employer or the background screening company, make the dispute process easy for the candidate. Do not create obstacles for the candidate, such as requiring the dispute be in writing or completion of dispute forms. These types of practices also may be viewed as not aligning with the spirit of adverse action.
- Do not require the candidate conduct their own re-investigation or any portion of it. Do not require candidates provide “proof” documents, such as an expungement order or court record. Although the candidate may choose to assist in the re-investigation process to expedite its completion, it is not his/her responsibility to do so. The responsibility for re-investigation rests with the background screening company.
- Do not take any action or make any statements, written or verbal, that imply a decision has been made prior to the candidate having the opportunity to dispute. For example, do not mark a background report as “Does Not Qualify” or “Ineligible” prior to the dispute and re-investigation

process being completed. If you are conducting individualized assessment as recommended by the EEOC, do not indicate a decision has been made prior to the individualized assessment being completed.

- Treat the candidate with courtesy and respect, proceeding on the assumption that problems in the background report will be resolved and the candidate will become an employee. Be an ally, not an adversary in the re-investigation and resolution process.

Hundreds of employers, from a broad range of industries, have been sued for allegedly failing to meet FCRA adverse action requirements. Class action settlements of \$2 - \$8 million have become common.

ACTION ITEMS FOR EMPLOYERS

- Review your policies and procedures for handling a background report containing potentially disqualifying information. Ensure the “pre-adverse, wait, and adverse action” steps are included. If you conduct individualized assessment, also review those policies and procedures.
- Inspect how policies and procedures are actually applied to confirm team members are following procedures as designed. Consider whether the documentation created during the adverse action process is appropriate and how it is retained.
- Evaluate whether additional training is needed for team members handling background reports and particularly reports with adverse information. Given the importance of adverse action, consider refresher training for all involved.
- Consult with legal counsel regarding your adverse action processes and compliance with the FCRA, as well as any special requirements that apply in your city or state.
- If not already part of your processes, consider incorporating individualized assessment in your adverse action processes.

SAMPLE PRE-ADVERSE ACTION NOTICE

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DATE

NAME_FIRST NAME_MIDDLE NAME_LAST

ADDRESS

CITY, STATE ZIP

Dear NAME_FIRST NAME_MIDDLE NAME_LAST:

The purpose of this letter is to inform you that your application for employment has been placed on hold based, in whole or part, on information in your background report. (This background report is also known as a “consumer report” or “investigative consumer report.”) You authorized us to obtain your background report as part of your application process. The report was prepared for us by [insert name and address of background screening company.] A copy of your background report is enclosed, along with “A Summary of Your Rights under the Fair Credit Reporting Act.” Depending on your location, additional state and local notices may also be enclosed.

Based on your background report, an adverse employment decision is possible; however, no decision has been made at this time. If you believe your background report is incomplete or inaccurate, please contact [insert name of screening company] immediately at [insert toll-free number] and advise them you dispute information in the report. [Screening Company] will then re-investigate the information you dispute and there will be no charge to you for this re-investigation. [Screening Company], however, has no role in our employment decisions and cannot explain why we have chosen to place your application on hold.

If your background report is accurate but you would like to discuss the circumstances surrounding any negative information in the report, please contact us directly (not background screening company) at the number shown below. It is our policy to individually assess the qualifications, skills, and experience of each applicant based on the desired position and we welcome your input.

Within X business days please:

- Contact [Screening Company] if you wish to dispute any information in your background report, OR
- Contact us directly if you wish to discuss any negative (but accurate) information in your report.

No decision regarding your employment has been made at this time. If you do not contact [Screening Company] or us within X business days, however, we will finalize our decision and an adverse decision is possible. Thank you.

Sincerely,

CONTACT NAME

Employer
Toll Free Number

Enclosures

REMINDER: Attach copy of background report, federal summary of rights, and state/local notices if applicable.

SAMPLE ADVERSE ACTION NOTICE

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DATE

NAME_FIRST NAME_MIDDLE NAME_LAST
ADDRESS
CITY, STATE ZIP

Dear NAME_FIRST NAME_MIDDLE NAME_LAST:

The purpose of this letter is to inform you that you are no longer being considered for employment with our company. If a contingent offer of employment was made previously, that offer is now withdrawn. Our decision to not employ you was based, in whole or part, on information in your background report (also known as a “consumer report” or “investigative consumer report”).

The background report, the preparation of which you authorized, was prepared by [insert name and address of background screening company]. [Screening Company], however, has no role in our employment decisions and cannot explain our decision.

We previously contacted you in writing regarding your background report and the potential for an adverse employment decision. At that time, we provided you with a copy of your background report and “A Summary of Your Rights under the Fair Credit Reporting Act,” along with any other applicable state and local notices. You were given X business days to contact [Screening Company] to dispute the accuracy and completeness of information in the report. Also, you were given that same amount of time to contact us to discuss the circumstances surrounding any negative information in your report.

If you would like another free copy of your background report, please contact [Screening Company] within 60 days. You may also contact [Screening Company] if you wish to further dispute information in your background report. For your convenience, another copy of “A Summary of Your Rights under the Fair Credit Reporting Act” is enclosed, along with any applicable state and local notices.

Sincerely,

CONTACT NAME

Employer
Toll Free Number

REMINDER: Attach federal summary of rights and state/local notices if applicable.

ABOUT EBI

EBI is a technology driven innovator and leader in providing domestic and global pre-employment screening, drug testing, occupational healthcare, and I-9 compliance solutions. With emphasis on business process optimization, EBI services over 5,000 clients in over 200 countries and territories worldwide and specializes in the development, implementation and management of comprehensive and customized employment screening programs for large and multi-national clients. EBI is a founding member and active participant within the National Association of Professional Background Screeners (NAPBS). EBI is accredited by the Background Screening Credentialing Council (BSCC) created by the NAPBS.

EBI is one of only a few NAPBS Accredited background screening companies in the world to hold both an ISO 27001:2013 certification for information security and an ISO 9001:2008 certification for Quality Management.

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