



## Compliance with the FCRA

The Fair Credit Reporting Act can be found at: <http://www.ftc.gov/os/statutes/fcradoc.pdf>

The information in this document is presented for general educational purposes and is provided solely for the convenience of its readers. It is not a substitute for legal advice. Consultation with qualified legal counsel is recommended for all matters of employment law.

This document addresses US federal requirements as found in the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq. related to the procurement and use of consumer reports and investigative consumer reports (also known as background reports) for employment purposes. This document does not address background screening requirements found in State law, International law, or regulated industries.

### Background Screening and Employer Compliance with the FCRA

#### Definitions

- **Adverse Action:** A negative employment action such as not hiring an applicant; not promoting or not retaining an employee.
- **Authorization:** Obtaining written permission from the applicant/employee for the background investigation to be conducted.
- **Disclosure:** Refers to the document and the process of informing an applicant/employee that he/she will be the subject of a background report.
- **Final Adverse Action:** Referring to the document and the process when a negative employment decision is made, the applicant/employee receives notice of the decision.
- **First Notice:** Another name given to pre-adverse or preliminary adverse action.
- **Preliminary Adverse Action:** Referring to a document and the process when a negative employment decision is being considered, the applicant/employee receives notice, a copy of his/her background report, and *A Summary of Your Rights under the Fair Credit Reporting Act*. This is also referred to as "Pre-Adverse Action" and "First Notice."
- **Second Notice:** Another name for "Final Adverse Action."

## Summary of Background Screening Process

Following are the key steps that an employer must take to obtain a background report on an applicant/employee.<sup>1</sup>

1. Employer discloses in writing<sup>2</sup> to applicant/employee that he/she will be the subject of a background report as part of the employment selection process.
2. Employer obtains signed<sup>3</sup> authorization for preparation of a background report from applicant/employee.
3. Employer provides information about the applicant/employee to the background screening company and requests background screening.
4. Background screening company conducts the background checks which were requested by employer and prepares background report.
5. Background screening company provides background report to the employer and, if requested by applicant/employee, provides copy to applicant/employee.
6. 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 7-10 are used only when an employer is considering an adverse employment action.**

7. If employer is considering an adverse employment action based in whole or part on information in the background report, the employer<sup>4</sup> must:
  - a) notify applicant/employee,
  - b) provide a copy of the background report, and c) provide *"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.")
8. Applicant/employee contacts background screening company if s/he disputes any information in background report.
9. Background screening company re-investigates any disputed items of information and issues updated report to employer and applicant/employee.
10. Employer reviews updated report and makes final employment decision. If the employment decision is adverse, a notice of adverse action is sent to applicant/employee.<sup>5</sup> (This process is sometimes called "Final Adverse Action.")  
The key steps in this process which are the responsibility of the employer are addressed in greater detail in the following pages.

<sup>1</sup> In cases of suspected misconduct or illegal activity by an employee and with the exception of credit information, disclosure and authorization is not required. Limited disclosure after the fact, however, is required.

<sup>2</sup> Alternate methods of providing disclosure are permitted for those positions under the authority of the US Secretary of Transportation and positions subject to safety regulations by a State Transportation Agency.

<sup>3</sup> Alternate methods of obtaining authorization are permitted for those positions under the authority of the US Secretary of Transportation and positions subject to safety regulations by a State Transportation Agency.

<sup>4</sup> Per the FTC, this may be done by the background screening company on behalf of the employer. FTC Opinion Letter from William Hayes, FTC Staff Attorney, to Michael Rosen; June 9, 1998.

<sup>5</sup> See Footnote 2.

## Detailed Process and Requirements

These four items are key responsibilities of the employer in the background screening process.

### 1. Required - Disclosure to Applicant/Employee

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.<sup>6</sup> 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.<sup>7</sup> It must be *"...in a document that consists solely of the disclosure"* or the *"...authorization may be made on the [disclosure] document..."*<sup>8</sup>

The applicant/employee must also 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."

Hire Image includes 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. The employer must retain the original document.

<sup>6</sup> See Footnote 1.

<sup>7</sup> See Footnotes 2.

<sup>8</sup> Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681b(b)

### 2. Required - Written Authorization

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.<sup>9</sup> Regardless of whether combined with the disclosure or as a standalone document, the authorization must be signed<sup>10</sup> 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.

You may be required to provide a copy of the authorization (or combined disclosure and authorization) to Hire Image when requesting a background investigation.

<sup>9</sup> FTC Opinion Letter from Cynthia Lamb, FTC Investigator, to Richard Steer; October 21, 1997.  
<http://www.ftc.gov/os/statutes/fcra/steer.htm>

<sup>10</sup> See Footnotes 2 and 3.

### 3. Required - Pre-Adverse Action Procedures

*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."*<sup>11</sup> 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.<sup>12</sup>

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 (example included).

<sup>11</sup> FTC Opinion Letter from William Haynes, FTC Staff Attorney, to Harold Hawkey; December 18, 1997.  
<http://www.ftc.gov/os/statutes/fcra/hawkeycb.htm>

<sup>12</sup> FTC Opinion Letter from Clarke W. Brinckerhoff, FTC Staff Attorney to Erick Weisberg; June 27, 1997.  
<http://www.ftc.gov/os/statutes/fcra/weisberg.htm>

## 4. Required - Adverse Action Procedures

*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.

**Sample Pre-Adverse Action Letter**

CONSUMER DISCLOSURE

CONFIDENTIAL TO BE OPENED BY ADDRESSEE ONLY

JOHN T DOE  
456 78TH STREET  
WASHINGTON, US 33333

January 30, 2011

Dear JOHN T. DOE,

We are writing to inform you that in evaluating your application for employment we have received the enclosed consumer report. This notification is provided because we may make an adverse decision that may be based, in whole or part, on this report. We are hereby informing you of certain information pursuant to the Fair Credit Reporting Act.

The report was procured pursuant to an authorization signed by you at the time of application. A summary of your rights as a consumer is enclosed. If you have any questions regarding this report or believe that it may contain incorrect information, you may contact them and they will respond to your inquiry. Their mailing address and phone number are listed below:

**Heartland Investigative Group**  
**520 Nicollet Mall, Suite 520**  
**Minneapolis, MN 55402**  
**(V) 800-967-1882**  
**(F) 800-695-9531**

Heartland Investigative Group only provided us the consumer report and plays no part in the decision to take any action on your employment application. Heartland Investigative Group is unable to provide you with specific reasons for any employment related decisions to be made.

Sincerely,

EMPLOYING COMPANY

Enclosures: Consumer Report; Consumer Rights Notification

**Sample - Adverse Action Letter – Denying employment**

CONFIDENTIAL TO BE OPENED BY ADDRESSEE ONLY

JOHN T. DOE  
456 78TH STREET  
WASHINGTON US 33333

January 30, 2011

Dear JOHN T. DOE,

This letter is to inform you that an offer of employment will not be made at this time. This decision was based in whole or in part, on the information provided us in a Consumer Report or Investigative Consumer Report.

The report was prepared pursuant to an authorization signed by you at the time of application. Subsequently you also received a copy of your consumer report and a summary of your rights under the Fair Credit Reporting Act. The consumer report was used only for employment purposes and prepared for us by a consumer-reporting agency. Their mailing address and phone number are listed below:

**Heartland Investigative Group**  
**520 Nicollet Mall, Suite 520**  
**Minneapolis, MN 55402**  
**(V) 800-967-1882**  
**(F) 800-695-9531**

Heartland Investigative Group plays no part in the decision to take any action on your employment application. Heartland Investigative Group is unable to provide you with specific reason(s) for not extending an offer of employment.

You may, upon providing proper identification, request another free copy of the report and may dispute with the consumer reporting agency the completeness or accuracy of any information in the report within 60 days of receipt of this notice with Heartland Investigative Group.

Sincerely,

EMPLOYING COMPANY

## Instructions on Providing Adverse Action and Other Letters from Hire Image's Online System

To print an adverse action letter from the Hire Image online system, locate the applicant's file in the system using the "Find" feature from the home page. Scroll down the page to the dropdown box containing "Select Disclosure or Form" and click on the down arrowhead in the right of the box and select the desired option to print a report described below.

**Adverse Action - Employment Denial:** This report must be provided to the applicant if employment will not be offered based on information contained in whole or part, in the consumer credit or investigative report. The report includes a cover letter informing the applicant of the reporting agency, the right to request an additional report, and the right to dispute the completeness or accuracy of the information in the applicant's report

**Adverse Action - Employment Withdrawal Offer:** This report must be provided to the applicant if an offer of employment is withdrawn offered based on information contained in whole or part, in the consumer credit or investigative report. The report includes a cover letter informing the applicant of the reporting agency, the right to request an additional report, and the right to dispute the completeness or accuracy of the information in the applicant's report.

**Consumer Copy:** This report is to be provided to the applicant if s/he requests a copy of their consumer report. The first page is a cover letter to the applicant; also included is the applicant's complete consumer report and the FCRA Summary of Rights.

**Contemporaneous Notice - Full Disclosure:** This report is provided to the applicant as notice of consumer reporting information being disclosed by the reporting agency to the employer.

**Pre-Adverse Action - Full Disclosure:** This report must be provided to the applicant if there may be an adverse decision that may be based, in whole or part, on the consumer report. The report includes a cover letter informing the applicant of the informing agency, the applicant's complete consumer report and the FCRA Summary of Rights.

**Remedying the Effects of Identity Theft:** This report should be provided to an applicant if s/he believes they are a victim of identity theft. The report provides the applicant steps to take to contact reporting agencies and the FTC.