

Complying with the Fair Credit Reporting Act (FCRA) in Four Easy Steps©

By Attorney Lester Rosen, Founder, and CEO of Employment Screening Resources (ESR)

Introduction

Under the federal Fair Credit Reporting Act (FCRA), an employer has legal responsibilities regarding adverse action notices where a consumer report, in whole or in part results in an employer making a determination that they intend to take an adverse action in regards to employment, such as not hiring a person, or not retaining, not reassigning or not promoting. The required notices must include: 1) providing preliminary adverse action notice to consumer, along with copy of consumer report and [“A Summary of Your Rights under the Fair Credit Reporting Act,”](#) 2) allowing consumer a designated period of time to contact CRA if consumer wishes to dispute any information in consumer report, 3) providing CRA contact information, and 4) providing a final adverse action notice to consumer if a final adverse employment decision is made. The purposes to ensure that a consumer is not denied an opportunity unfairly based upon anything in a report being incorrect or incomplete. This article explains how the process works.

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Employers have become acutely aware that hiring a job applicant with an undesirable background, criminal record or falsified credentials can carry enormous economic and legal consequences. Many employers utilize pre-employment background screening to be more careful about who is hired in the first place.

Pre-employment background screening promotes a safe and profitable workplace, by protecting an employer from negligent hiring exposure, wrongful termination lawsuits, incidents of sexual harassment, financial loss, false claims, theft, workplace disruption or time wasted in recruiting and training the wrong candidate.

Background pre-screening is normally conducted by outside agencies called Consumer Reporting Agencies (CRA). Other than calling former employers for references, employers generally cannot conduct such screenings in-house due to the specialized resource and knowledge involved. In addition, firms risk legal liability if the procedures utilized to check on applicants infringe on legally protected areas of privacy.

A federal law called the Fair Credit Reporting Act (FCRA), however, governs pre-screening obtained from outside agencies. This law sets out various requirements and rules for pre-employment background reports, called Consumer Reports. This law was substantially amended on September 30, 1997, to provide greater privacy protection to consumers, and to ensure that information was accurate and complete. Some important amendments were made in 1998.

A Consumer Report is much broader in scope than just a credit report. It affects a wide variety of information obtained concerning job applicants. A Consumer Report includes criminal and civil records, driving records, civil lawsuits, reference checks and any other information obtained by a Consumer Reporting Agency. By following the FCRA, an applicant's privacy rights are protected. For this reason, many legal experts advise employers to engage the services of an outside screening firm.

When engaging the services of a Consumer Reporting Agency, both the employer and the CRA must follow the four steps described in this report. Failure to do so can result in substantial legal exposures, including fines, damages, punitive damages and attorneys' fees. Private investigators who engage in the business of pre-employment background screening are also covered by the FCRA.

STEP ONE: An Employer must certify to the Consumer Reporting Agency that it will follow the FCRA (FCRA Section 604)

Prior to supplying a Consumer Report, an employer must certify to the Consumer Reporting Agency (CRA), that the employer will follow all the steps set forth in the Fair Credit Reporting Act. These include:

- That the employer will use the information for employment purposes only.
- That the employer will not use the information in violation of any federal or state equal opportunity law.
- That the employer will obtain all the necessary disclosures and consents as discussed below.
- That the employer will give the appropriate notices in the event that an adverse action is taken against an applicant based in whole or in part on the contents of the Consumer Report
- That if a special type of consumer report is requested, called an Investigative Consumer Report, that the employer will give the additional information required by law.

These requirements are explained further in a document entitled [“Notice to Users of Consumer Report: Obligations of Users Under the FCRA.”](#) The FCRA requires a Consumer Reporting Agency to provide a copy of that document to every employer who requests a report.

STEP TWO: An Employer must obtain a written Release and a separate Disclosure from a job applicant before obtaining a Consumer Report (FCRA Sections 604 and 606)

Before obtaining a consumer report from a Consumer Reporting Agency, the employer must obtain written consent from the applicant and provide the applicant with a clear and conspicuous written disclosure that a background report may be requested. The disclosure must be provided in a standalone document to prevent it from being buried in an employment application. A 1998 amendment to the FCRA clarified that the disclosure and consent may be in the same document. However, the Federal Trade Commission (FTC), which enforces the FCRA, cautions that the form should not contain excessive information that may distract a consumer.

The Consumer Reporting Agency will normally provide employers with the forms needed for the Disclosure and Release. A special procedure is necessary where the employer requests a Consumer Reporting Agency to obtain employment references. Where the Consumer Reporting Agency is merely verifying factual matters, such as the dates of employment or salary, no special procedure is necessary. However, where the Consumer Reporting Agency is asking for information such as job performance, then that falls into a special category of consumer report called an “Investigative Consumer Report.”

When an Investigative Consumer Report is requested, there are some special procedures to follow:

- There must be a disclosure to the applicant that an investigative consumer report is being requested, along with a certain specified language. Unless it is contained in the initial Disclosure, the consumer must receive this additional disclosure within three days after the request is made.

- The Disclosure must tell the applicant that they have a right to request additional information about the nature of the investigation.
- If the applicant makes a written request, then the employer has five days to respond with additional information and must provide a copy of a document called [“A Summary of Your Rights Under the Fair Credit Reporting Act”](#) (which your background agency should provide).

As a practical matter, a Consumer Reporting Agency should handle all of these requirements for an employer as part of their services.

STEP THREE: If adverse action is intended as a result of a Consumer Report, then the applicant is entitled to certain documents (FCRA Section 604)

Where an employer receives a Consumer Report, and intends not to hire the applicant based upon the report in any way, then the applicant has certain rights. Before taking the adverse action, the employer must provide the following information to the applicant:

- The document [“A Summary of Your Rights Under the Fair Credit Reporting Act”](#) – This document should be provided by the screening service and the newest version is from the Consumer Protection Financial Bureau (CFPB) and should be used by January 1, 2013.

Here is a sample "Pre-Adverse Action" letter:

[DATE]

[COMPANY NAME]

[ADDRESS]

[CITY][STATE][ZIP]

RE: PRE-ADVERSE ACTION NOTICE

Dear [FIRST NAME][LAST NAME],

We are required to inform you that you may be denied the position you are seeking with our organization based on information received in a background investigation report from the following consumer reporting agency:

Employment Screening Resources (“ESR”)

7110 Redwood Blvd, Suite C

Novato, CA 94945

888-999-4474

We attached a copy of the report provided to us, as well as a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” prepared by a governmental agency.

- 1. If you want to dispute any inaccurate or incomplete information in the report, please contact ESR directly without delay (see contact information above).*
- 2. If you want to explain any items in the report that will help us make a final decision, please contact the person below without delay.*



Sincerely,

[COMPANY NAME]

[USER FIRST NAME][USER LAST NAME]

[USER EMAIL ADDRESS]

Enclosures:

Copy of your background investigation report

A Summary of Your Rights Under the Fair Credit Reporting Act

The purpose is to give an applicant the opportunity to see the report that contains the information that is 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 may be denied employment without ever knowing they were the victims of inaccurate or incomplete data.

An additional form can also be sent with the pre-adverse action letter if an employer plans on instituting a procedure for an "Individualized Assessment." This follows a best practice recommendation by the U.S. Equal Employment Opportunity Commission (EEOC) in their updated "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" issued on April 25, 2012 (See: www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

According to the EEOC, an "Individualized assessment" generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity."

An applicant may show that either the background check report is incorrect or incomplete or that even if the background check is true and complete, there are reasons the criminal record is not disqualifying. If the consumer has a complaint about the accuracy of the background check, the consumer needs to contact the screening firm. If a consumer concedes that background report is accurate but still believes he or she should be considered, then the consumer needs to talk to the employer.

In addition to the pre-adverse action letter, a second letter should be sent advising the applicant that they may request an individualized assessment. It is a better practice to send two separate letters rather than combining the two, in order to demonstrate compliance with both the FCRA and the EEOC Guidance.

Here is a sample [ESR Individualized Assessment Notice](#):

[COMPANY NAME]

[ADDRESS]

[CITY][STATE][ZIP]

*REQUEST FOR INFORMATION REQUIRED FOR
INDIVIDUALIZED ASSESSMENT OF CRIMINAL RECORD HISTORY*

[DATE]

Dear [FIRST NAME][LAST NAME],

This notice provides you with required information that is unrelated to any other communication you may have received regarding your application.

- IF NO CRIMINAL HISTORY is found in your background check report (a copy was attached to the Pre-Adverse Action Notice sent to you today by separate email), you may disregard this notice and take no further action.
- IF A CRIMINAL HISTORY is found in your background check report, you should review the attached “Individual Assessment Factors” with respect to your criminal record(s) history. If you would like us to give additional consideration to your circumstances, please reach out to the person listed below as soon as possible with any additional information you would like us to consider.

Sincerely,

[COMPANY NAME]

[USER FIRST NAME][USER LAST NAME]

[USER EMAIL ADDRESS]

[Enclosure: Individual Assessment Factors](#)

Of course, if the applicant fails to respond to the letter about an “Individualized Assessment,” an employer does not need to take any further action. If the applicant fails to respond to the pre-adverse action letter, the next step is the post adverse action notice.

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.

Even 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. If the intended decision was based in whole or 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 used against an applicant is not even 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 that the debt level is too high compared to the salary. The applicant still is entitled to a notice of pre-adverse action, because it is possible that the credit report is wrong about the applicant's outstanding debts. In a situation where the employer would have made an adverse decision anyway, regardless of the background report, following the adverse action procedures is still the best practice for legal protection.

The 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 that an employer should wait a reasonable period of time before making the final decision. According to an opinion letter from the Federal Trade Commission (FTC), a minimum period of five business days would be reasonable, although an employer may consider a longer period just

to be on the safe side. This period should be the time that would be 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 that 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 wait until there has been a re-investigation, or fill the position with another applicant. Most employers find as a practical matter that this provision of law does NOT impose any hardship or burden upon an employer. Even though in rare situations an employer may have questions on how to proceed, the clear advantages of a pre-employment screening program far outweigh any complications that can theoretically arise from compliance. This duty belongs to the employer, although it may be delegated to a background screening firm.

STEP FOUR: Notice must be given to an applicant after an adverse action (FCRA sec. 615)

If after sending out the documents required in Step 3, the employer intends to make the decision final, the employer must take one more step. The employer must send the applicant a Notice of Adverse Action informing the job applicant that the employer has made a final decision, along with another copy of the form [“A Summary of Your Rights under the Fair Credit Reporting Act.”](#)

The Notice of Adverse Action must contain certain information. The following is a sample “Adverse Action” letter that contains the necessary statements:

[DATE]

[COMPANY NAME]

[ADDRESS]

[CITY][STATE][ZIP]

Dear [FIRST NAME][LAST NAME],

We are required to inform you that you are no longer being considered for the position you were seeking with our organization. This decision was based in whole or in part on information in a background check report obtained from the following consumer reporting agency:

Employment Screening Resources (“ESR”)

7110 Redwood Blvd, Suite C

Novato, CA 94945

888-999-4474

Employment Screening Resources had no role in the decision regarding your employment and cannot explain to you why the decision was made.

Pursuant to the Fair Credit Reporting Act, you have the following rights:

- 1. You may obtain an additional free copy of your report within sixty days of receipt of this notice by contacting Employment Screening Resources (see contact information above).*
- 2. You may dispute any information contained in the report directly with Employment Screening Resources (see contact information above).*



Sincerely,

[COMPANY NAME]

[USER FIRST NAME][USER LAST NAME]

Enclosures:

Copy of your background investigation report

A Summary of Your Rights Under the Fair Credit Reporting Act

Many employers find it difficult to believe that Congress intended that an applicant be notified twice, both before an adverse action and after. However, 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.

The following is a copy of the summary of rights that should be given to a job applicant any time an employer sends one of the two letters in this report. This can be copied directly from this site, or by going to [“A Summary of Your Rights Under the Fair Credit Reporting Act.”](#) A one-page printed copy is available from ESR for ESR clients.

About the Author

Attorney Lester S. Rosen is founder and CEO of [Employment Screening Resources® \(ESR\)](#), a global background check firm located in the San Francisco, California area that is accredited by the National Association of Professional Background Screeners (NAPBS). Rosen is a nationally recognized background check expert and the author of “The Safe Hiring Manual,” the first comprehensive guide to employment screening, and “The Safe Hiring Audit.” He is a frequent presenter on safe hiring issues, and his speaking appearances for “ESR Speaks” include numerous state and national conferences. He was the chairperson of the steering committee that founded the NAPBS, a professional trade organization for the screening industry, and served as the co-chair in 2004. For more information about ESR, visit www.esrcheck.com.