



ALASKA SHRM STATE COUNCIL



## ADVERSE ACTION

PRESENTED BY BRYCE BREWER, PINNACLE INVESTIGATIONS

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# Trail Guide Series: *Adverse Action*

Presented by:  
Bryce Brewer



# Pinnacle Investigations

We provide accurate, timely, compliant background reports to aid our clients in building a safe, secure workplace. We provide education to help our clients meet their due diligence while understanding compliance and the rights of the applicant. At Pinnacle, we work in partnership with our clients and always have a trained professional available to help. We are committed to helping our staff become the best versions of themselves, and in turn, provide the highest quality service.



# Housekeeping

- All will be muted
- Type in questions at any time and we will get to as many as we can during the Q&A at the end.
- All questions and answers will be compiled and sent out to all attendees
- The entire presentation is being recorded and will be sent to everyone registered after the webinar

# Overview

- What is the FCRA and how does it pertain to me?
- Current Events
- What is Adverse Action
- Pre-Adverse Action
- Individualized Assessment
- Adverse Action – Final Steps
- Written Processes and Procedures
- Questions



# What is the FCRA

The Act (Title VI of the Consumer Credit Protection Act) protects information collected by consumer reporting agencies such as credit bureaus, medical information companies and tenant screening services. Information in a consumer report cannot be provided to anyone who does not have a purpose specified in the Act. Companies that provide information to consumer reporting agencies also have specific legal obligations, including the duty to investigate disputed information. In addition, users of the information for credit, insurance, or employment purposes must notify the consumer when an adverse action is taken on the basis of such reports. The Fair and Accurate Credit Transactions Act added many provisions to this Act primarily relating to record accuracy and identity theft. The Dodd-Frank Act transferred to the Consumer Financial Protection Bureau most of the rulemaking responsibilities added to this Act by the Fair and Accurate Credit Transactions Act and the Credit CARD Act, but the Commission retains all its enforcement authority.



# What is the FCRA

## Terms to know:

### Consumer Reporting Agency (CRA)

*-That's us*

### End user

*-That's you*

### Consumer

*- That's the applicant*

# What is the FCRA

The FCRA governs what CRA's and Employers do with the information compiled in a background report. What does this mean for you?

The End-User of the consumer report has 3 basic duties under the FCRA.

- **Provide certification to the CRA**
- **Make disclosure to and obtain authorization from the consumer**
- **Comply with Adverse Action Requirements**

# In the News



Last year Starbucks faced two class action lawsuits from FCRA violations based on failure to follow the Adverse Action protocols.

Jonathan Santiago Rosario (“Rosario”), alleges that he was denied employment as a Starbucks barista based on an inaccurate background report Starbucks obtained from Accurate Background, Inc. (“Accurate Background”). Rosario claims he was taken out of consideration for the position based on several criminal charges and convictions that appeared on his report. Rosario maintains that the report was inaccurate and that Starbucks took the adverse action weeks before he was provided with the report and the written summary of rights. Rosario argues that he never had a meaningful opportunity to dispute the report and that Starbucks never reconsidered him for the position.

*- The National Law Review*

*April 28, 2019*

# In the News



Kevin Wills (“Wills”) of Georgia, alleges that Starbucks took adverse employment action against him without providing proper notice and a written summary of rights under FCRA. Starbucks allegedly hired Wills pending the results of his criminal background check.

As a result of the report, Starbucks informed Wills over the telephone that he could not work for Starbucks. Days later, Wills received a letter enclosing the background report.

*- The National Law Review  
April 28, 2019*

While we do not know the exact amount of the Starbucks settlement yet, we have not seen an FCRA violation lawsuit settle for less than seven figures.

# In the News



Amazon in 2018 resolved claims it violated disclosure and authorization requirements under the FCRA with a \$5 million settlement, distributed among a class of 454,000 job applicants in the form of gift cards worth up to \$150.

The lead plaintiff said he was denied employment at the internet giant based on contents of a background report, but Amazon never provided him with a copy of the report on which the decision was based. "As a result, in violation of the FCRA, Plaintiff was deprived of any opportunity to review the information in the report and discuss it with Defendant before he was denied employment," the lawsuit reads.

- CBS News  
June, 28, 2019

# In the News

- Lawyers specialize in finding FCRA and EEOC lawsuits
- FCRA violations can bring damages of \$100 - \$1000 per violation
- FCRA also allows for punitive damages
- These lawsuits can be easily avoided with the proper policies and procedures in place

# **Per my last email**

*(phrase)*

**You better re-read the whole thing again so you won't ask me stupid questions.**

# Adverse Action

- **§ 603(k)(1)(ii)** of the FCRA defines Adverse Action as: “denial for employment or any other decision for employment purposes that adversely affects any current or prospective employee”.
  - This includes promotion, ...
- The Adverse Action notifications must be sent if the employment decision is based *“in whole or in part”* on adverse information in the consumer report.
  - Once you have seen the information, and you may reconsider the hiring decision, it becomes part of your decision matrix and the Adverse Action process must be instigated.
  - You cannot unsee adverse information and decide not to hire based on other relevant information.



# Pre-Adverse Action Notice

- Upon receiving adverse information from a CRA that could affect the decision to hire, ALL employers must provide the applicant with notice.
- An applicant must be notified that adverse information has been reported and is being considered in the hiring decision. This notification gives the applicant a chance to explain or dispute the findings.
- Notification can be mailed via USPS or email.
- You can send the letter or work with your background provider to send on your behalf.

# Pre-Adverse Action Notice

The notice must include the following:

- Copy of the background report
- Contact information for the CRA who provided the report
- Statement that the CRA did not make the decision
- Right to dispute inaccurate information on the report
- Summary of Rights under the FCRA

# Disputed Charges

The FCRA designates that disputes from the consumer be directed to the CRA and not the end user.

The CRA will conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate or incomplete – free of charge and:

- Record the current status of the disputed information, or
- Delete the item from the file.

# Disputed Charges

CRA's are required to "clearly and accurately" disclose certain information to consumers upon request. 15 U.S.C. § 1681g. If a consumer disputes the accuracy or completeness of the information about himself or herself contained in a consumer report, the CRA has rigorous and time-sensitive obligations to reinvestigate the disputed information, inform the furnishers of the information about the dispute, make deletions or corrections to the report if necessary, and inform the consumer about the results of the reinvestigation.



# Individualized Assessment

Once the Pre-Adverse Action notice has been sent, the EEOC has issued guidance recommending employers perform an individualized assessment before making a final decision not to hire the individual.

## Relevant evidence to be considered:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction with the same or a different employer, with no known incidents of criminal conduct;

# Individualized Assessment

## Relevant evidence to be considered:

- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, *e.g.*, education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

# Individualized Assessment

## EEOC Guidance

### JRBN

### Job Relatedness and Business Necessity

- El v. SEPTA (2007) introduces “business necessity” when making adverse hiring decisions.
- The employer needs to show that their policy operates to effectively link specific criminal conduct and its dangers with the particular job position.



# Individualized Assessment

## EEOC Guidance

The Guidance does not impose a restriction on considering recent convictions, or only a specified list of offenses.

It reinforces the Green factors and gives more insight to the 1987 Guidance (including new factors to be considered), advises against bright line policies, and reinforces “job relatedness and business necessity.”

# Individualized Assessment

## Green Factors

- (i) the nature and gravity of the offense or offenses (which the EEOC explains may be evaluating the harm caused, the legal elements of the crime, and the classification, *i.e.*, misdemeanor or felony);
- (ii) the time that has passed since the conviction and/or completion of the sentence (which the EEOC explains as looking at particular facts and circumstances and evaluating studies of recidivism); and
- (iii) the nature of the job held or sought (which the EEOC explains requires more than examining just the job title, but also specific duties, essential functions, and environment).

# Individualized Assessment

If a tight nexus is established between criminal conduct and a particular position, an employer could justify a screen based entirely on the *Green* factors, so the individualized assessment isn't required in all circumstances.

However, individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on an individual.

# Individualized Assessment

- Individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on an individual.
- Individualized Assessments can be done over the phone
- If the applicant does not respond to your attempts at an individualized assessment, action can be taken without conducting the assessment

# The Final Decision Not to Hire

- A final hiring decision should be made considering all relevant information and documented. This is intended to be a separate step!
- Don't automate your pre-adverse and adverse action letters. The FCRA intends these as separate steps, and the final hiring decision should also be made and documented as a separate step.
- Manual et al v. Wells Fargo Bank – 2015 case in which a court held Wells Fargo took adverse action with the first step (Pre-Adverse Action)
- Add a formal step to your policy which requires all information to be considered after the Individualized Assessment, at which time a hiring decision is made and documented before sending the Adverse Action letter.

# Adverse Action Notice

- When the decision regarding employment is made based on adverse information in the consumer report, the Adverse Action Notice must be sent to the applicant.
- *“There is no specific time period an employer must wait after providing a pre-adverse action notice before taking adverse action. Some reasonable period of time must elapse...”*
- Congress and the FTC recommend waiting a minimum of 5 days.
- *-FTC Staff Report, July 2011, p. 52*

# Common Mistakes to Avoid

- **Not having an Adverse Action policy in place**
- **Not following the Adverse Action process**
- **Circumventing the Adverse Action Process**
  - **Making hiring decision on 'other' information**
  - **Not having proper paperwork**

# The Adverse Action Process

Adverse information is discovered on the report.

Send applicant a Pre-Adverse Action letter.

Perform individualized assessment.

Make a final hiring decision.

Send Adverse Action letter if applicant will not be hired.  
(must wait 5 days)



# Processes and Procedures

The best way to protect your company from costly litigation is to create and follow clear and simple written procedures. Make sure to address the following:

- What positions will get a background check.
- List any “disqualifying” offenses identified in your hiring matrix. (JRBN) No automatic disqualifiers!
- Describe Individualized Assessment protocols.
- Include Pre-Adverse Action and Adverse Action Notification processes.
- Describe your policy for protecting PII.

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# GOVERNMENT

IF YOU THINK THE PROBLEMS WE CREATE ARE BAD,  
JUST WAIT UNTIL YOU SEE OUR SOLUTIONS.

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# Questions & Answers

You may contact us with any questions  
800-955-5306  
[info@pinnacleprof.com](mailto:info@pinnacleprof.com)





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## ADVERSE ACTION

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