Does an Employers Receiving an Updated Background Screening Report Have an Obligation to Send a Second Pre-Adverse Action Notice to an Applicant?

Your phone rings and its' a client you performed a background check for. The client says, "as you are aware John Doe an applicant for our Maintenance Engineer position was sent a 'pre-adverse action notice' based on the preliminary report you sent to us. We just received your updated report which essentially contains the same information although it is more comprehensive." Your client asks, "Do we need to send John another pre-adverse action notice?

Before I provide the answer to this question, let's be sure everyone understands what a 'pre-adverse action notice' is all about and the Fair Credit Report Act (FCRA) requirements.

The following is an overview summary of an applicants' major rights under the FCRA. (For more information, including information about additional rights, go to www.ftc.gov/credit)

- An applicant must be told if information in their file has been used against to deny the applicant employment – or to take another adverse action against him/her – the person must be informed and provided the name, address, and phone number of the agency that provided the information.
- An applicant has the right to know what is in their file. An applicant may request and obtain all the information about him/her in the files of a consumer reporting agency (your "file disclosure).
- An applicant has the right to dispute incomplete or inaccurate information. If an applicant identifies information in their file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless the dispute is frivolous.
- An applicant may seek damages from violators. If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.
- Identity theft victims and active duty military personnel have additional rights.

Also note that many states may have their own consumer reporting laws which you may also need to adhere to.

This is an example of a pre-adverse action letter:

[Date]

[Applicant's Name]

[Applicant's Address]

Dear [Applicant Name],

Enclosed is a consumer report that we requested in connection with your application for employment with our company. In accordance with the federal Fair Credit Reporting Act (FCRA), also enclosed is a copy of your rights under the Act.

Due, in part, to the contents of this consumer report, a decision is pending regarding your application for employment. As required under the FCRA, we are notifying you in advance of any adverse action being taken.

You have the right to dispute the accuracy of the information in this report by contacting the consumer reporting agency listed below directly. The consumer reporting agency did not, however, make this employment decision and cannot provide specific reasons for the decision.

[Consumer Reporting Agency Name]

[Consumer Reporting Agency Address]

[Toll-free phone number of Consumer Reporting Agency]

Sincerely,

HR Representative

Enclosures:

Copy of Consumer Agency Report

A Summary of Your Rights Under the Fair Credit and Reporting Act

With the above information in mind, how would you have responded to your client's question?

The following is how a judge in a recent case responded to this exact situation.

Pam Devata and Jennifer Mora of Seyfarth Shaw LLP wrote in a recent article, *Court Holds That Receiving an Updated Background Report May Require a Second Pre-Adverse Action Notice*:

"A recent federal court decision demonstrates the importance of employers following these highly technical requirements when using background reports for hiring and other employment decisions. In *Wright v. Lincoln Prop. Co.*, a judge in the Eastern District of Pennsylvania considered how an employer can comply with the adverse action process if it relies on an initial background report before revoking a job offer, but then receives a subsequent, corrected report. In *Wright*, the plaintiff received an employment offer that was contingent upon successful completion of a background check. The first background report, dated June 6, was a partial, in-progress report that revealed a misdemeanor conviction for driving under the influence and two separate drug-related felony convictions. A week later, on June 13, a more comprehensive, final report was provided to the employer, but it included the same substantive criminal information.

> The employer sent the partial June 6 report to the plaintiff, but did not send the final, completed June 13 report."
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> Both parties moved for summary judgment. In alleging the employer violated the FCRA, the plaintiff raised two arguments. First, he argued he never "received" a copy of the June 6 report. The court summarily rejected this argument, concluding the FCRA does not explicitly require an employer "to ensure that the consumer to whom the report relates actually received the notice." Instead, the FCRA merely requires the employer to "provide" a copy of the report.
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> [In this case,] the plaintiff argued the June 6 report did not satisfy the FCRA because it did "not contain the required information, including a summary of rights and advance notice of [the employer's] intention to withdraw its job offer based on the report." He also argued the employer relied on the June 13 report (which was never provided to him) and, thus, sending the June 6 report did not satisfy the FCRA. On the other hand, the employer argued in its motion that dismissal of the claim was appropriate because (a) it provided the plaintiff with a copy of the report and the FCRA summary of rights and (2) the convictions, which were listed in both reports, were not erroneous and, in fact, the plaintiff had admitted to them.
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> The court concluded that a jury should resolve the dispute. In so doing, the court noted that the employer revoked the offer because of the convictions listed in both reports and that while there were no material differences between the criminal history included in the two reports, the final, June 13 report "contain[ed] a more thorough summary of other types of searches run by [the background check company], such as credit report" and the plaintiff "remained unable to contest the full information upon which [the employer] relied even if he indeed received the June 6th transmittal, given that it only included his criminal history." Because a copy of the final report was not sent to the plaintiff, the court denied the employer's motion for summary judgment."

According to Devata and Mora "The court's ruling does not equate to a blanket requirement that an employer provide all copies of background reports to rejected job applicants or terminated employees. . ."

Consider the following:

In this case, the plaintiff filed for summary judgment alleging the employer violated the FCRA, because he argued he never "received" a copy of the June 6 report. While this court summarily rejected this argument, concluding, "Nothing in the plain text of FCRA § 1681b(b)(3)(A) requires entities relying on background checks to ensure that the consumer to whom the report relates actually received the notice. The statute simply states that the entity intending to take adverse action against an employee "shall provide" a copy of the report to the consumer to whom the report relates. There is nothing in the statute, and Mr. Wright does not point to any case law, establishing a requirement that the entity intending to take adverse action take measures to ensure receipt."[6]

While this was an explicit and clear decision by this judge, I find it worrisome that the FCRA language is "shall provide" a copy of the pre-adverse action notice because I believe it is within the realm of possibility that another judge could determine that "must provide" can be construed to mean 'actual receipt' or at minimum 'proof of delivery.' To this point, our counsel (not to be construed as legal advice) is that employers always take the extra step of ensuring that pre-adverse action notices are sent with proof of delivery. This way there is no wiggle room for an applicant to assert that the employer did not fulfill their obligation.

Not withstanding the viewpoints of the esteem attorneys of Seyfarth Shaw LLP I believe that given the highly litigious environment we currently have with technical violations of the FCRA employers should consider being overly cautious in assuring they are fulfilling the technical requirements of the FCRA.

Regarding the question whether a second report should have been sent to the applicant, in this case, the second report which contained essentially the same information that was contained in the first report along with more comprehensive information and additional information that could be considered regarding potential employment. The conservative and safest position for an employer to take would be to consider this the same as a 'new' report and send out a second pre-adverse action notice. Weighing the cost of this additional mailer versus dealing with a legal challenge comes demonstratively on the side of sending a second notice.

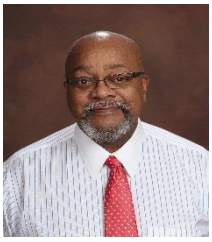
Keep in mind that laws generally identify the minimum requirement that must be met. Our consistent counsel (not legal advice) to employers is to strive for achieving 'best practices' which almost always exceed the legal minimum requirement. This approach not only ensures you satisfy the letter of the law, but more importantly puts the organization in a better performance situation.

"Now more than ever, employers that conduct background checks, whether pre-hire or during employment, should consider taking [best practice] steps to ensure they are [doing more] than just complying with the FCRA's notice requirements, including a privileged review of their background check process documents and notices and the procedures used when ordering background reports and relying on them when making employment decisions."[1]

Bibliography

1. Devata, P. Q., & Mora, J. L. (2017, October 10). Court Holds that Receiving an Updated Background Report May Require a Second Pre-Adverse Action Notice. Retrieved from https://www.laborandemploymentlawcounsel.com/2017/10/court-holds-that-receiving-an-updated-background-report-may-require-a-second-pre-adverse-action-notice/

About the Author



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