**FRCA Procedural Requirements**

Employers must follow certain procedures under the FCRA if they intend to take adverse action such as revoking a job offer or firing an employee, based in whole or in part on the contents of a consumer report. Failure to properly execute one of these steps could result in liability under the FCRA.

\***Disclosure and pre-authorization**. Before obtaining a report, the employer must provide a clear and conspicuous" written disclosure to the consumer in a document that consists solely of the announcement that a consumer report may be obtained, without extraneous material like liability waivers. The employer must also obtain the applicant or employee's written authorization. Failure to properly send a stand-alone disclosure or obtain written authorization has resulted in an [increase of class-action settlements against employers](https://webrecon.com/webrecon-stats-for-september-2017-duck-duck-duck-duck-fcra/?utm_source=ActiveCampaign&utm_medium=email&utm_content=WebRecon+Newsletter+++Sept+2017+Stats:+Duck%2c+Duck%2c+Duck%2c+Duck%2c+FCRA&utm_campaign=Sept+2017+Newsletter).

\***Pre-adverse action letter/copy of report/rights under FCRA**. Before making a final employment decision based in whole or even in part on the results of a consumer report, the employer must provide a pre-adverse action notice to the individual, which includes a copy of the applicant's consumer report and a document summarizing their rights under the FCRA. An example of this is the Consumer Financial Protection Bureau's [Summary of Rights](https://s3.amazonaws.com/files.consumerfinance.gov/f/201504_cfpb_summary_your-rights-under-fcra.pdf).

Adverse action generally includes any employment-related decision that negatively affects the employee. The purpose of providing a pre-adverse action notice is to allow the applicant or employee a chance to discuss the background report with the employer before becoming subject to any adverse action.

\***Waiting period**. While not explicitly prescribed by the FCRA, courts and [Federal Trade Commission guidance](https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-weisberg-06-27-97) suggest five days is a reasonable period to wait after the pre-adverse action notice and before taking adverse action.

\***Adverse action letter**. After the waiting period, the employer is required to provide a post-adverse action notice to the individual, which includes the name and contact information of the consumer reporting agency that provided the background check on which the adverse employment decision was based; a statement advising the individual that the consumer reporting agency did not make the adverse employment decision and therefore cannot provide any reasons why the adverse action was taken; and notification that the applicant or employee is entitled to receive a free copy of the background check or consumer report on which the adverse action was based within a 60-day period.

**Other Legal Considerations**

Simply following the FCRA playbook does not mean employers can use the results of background checks in any manner that they choose. The laws of certain states limit the consideration that employers can give to certain criminal record history in the hiring process.  For example, California does not allow employers to consider or seek information about certain types of criminal records, including an arrest or a detention that did not result in a conviction and certain marijuana infractions and misdemeanor convictions older than two years. Massachusetts likewise expressly prohibits any employment-related inquiries about arrests that did not result in a conviction. Employers need to be aware of and to check the laws of the states where they employ and hire individuals.

The use of criminal history in hiring also carries Equal Employment Opportunity Commission (EEOC) considerations. For example, an employer who adopts a blanket policy of excluding all applicants with an arrest record could be facing disparate impact liability under federal non-discrimination law if (a) such policy or practice disproportionately affects a protected class; and (b) the employer cannot show that the policy or practice is "job related and consistent with business necessity."