

Yet More Paperwork? New Obligations for California Employers Performing Employee Background Checks

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Identity Theft:
A Growing Concern

According to California Senator Cathie Wright (R - Simi Valley), identity theft is the fastest growing crime in the United States. Identity theft victims often have credit cards, checking accounts, and other services fraudulently opened in their names. In a worst case scenario, a victim can go for years without any knowledge that his personal information has been stolen and inappropriately utilized.

In an effort to address this rising concern, Senator Wright authored AB 655, which became law on January 1, 2002. The law increases the number of individuals who are obligated to provide copies of information obtained through credit or other background checks. The theory is that the more chances a consumer has to view such reports, the more chances he will have to catch any inaccuracies and/or fraud.

New Employer Obligations

The new statutes, Civil Code Sections 1785 and 1786, contain obligations which are of concern to all California employers. For years, California employers have been required to notify job applicants prior to requesting a credit report for employment purposes. Employers have also been obliged to provide a free copy of the report to the applicant upon request. Importantly, these provisions only applied where the employer obtained the report from an outside investigative agency. Under most circumstances, background information which the employer collected itself was not subject to the same notification requirements.

The new law, however, makes it quite clear that *any individual* who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on an individual's character, general reputation, personal characteristics, or mode of living for employment purposes must automatically provide a copy of the information to the individual. Anyone – employers included – must give notification to the affected person when a so-called "investigative consumer report" is obtained. Specifically, the information must be presented to the person within seven days after it is gathered or at any meeting or interview with the individual, whichever is earlier. The law does not change an employer's obligations where only a straightforward credit-check is completed through a third-party.

For example, many commentators have construed the new legislation to require an employer who is telephoning the personal references listed on a job applicant's resume in anticipation of interviewing the applicant, to either forward a copy of the information to the applicant at the job interview or within seven days, whichever comes soonest. It is unclear exactly what form the informational report needs to take. Must the

employer give a detailed, written report of exactly what each reference said? Or will a quickly drafted summary suffice? For now, each situation should be analyzed on a case by case basis considering the substance of the information obtained and the purpose for which it is collected. It is probably best to provide at least some form of written documentation to the consumer.

The above scenario is only one example of what the new law requires. Where the new rules do apply, the employers must provide a copy of the gathered information to applicants *and* current employees – even where the current worker is merely being investigated in connection with a possible transfer, promotion or other job reassignment.

The "Wrongdoing" Exception

Under former California law, it was unsettled whether a current employee had to be notified that an outside agency had been hired to conduct an investigation where the employee was suspected of wrongdoing. Fortunately, the new legislation makes it clear that an outside investigative organization need *not* notify the implicated individual. For example, in cases where an employee is suspected of sexually harassing co-workers, employers often hire an outside investigator to look into the employee's background and the overall substance of the allegations. Under the old version of the statute, it was not clear if the outside investigator had to tell the suspected worker that he or she was being scrutinized. Such notification could obviously interfere with the quality of the investigation and many employers argued that no such notice should be required. The new statute specifically exempts outside agencies from the usual notification requirements where employee wrongdoing is suspected. Outside agencies are *not* required to notify the suspected wrongdoer that an investigation is underway. However, it seems that notification must be given after the investigation is complete.

Unfortunately, the new statute is silent as to whether an employer which conducts an *internal* investigation into suspicions of employee wrongdoing is likewise exempted from the notification requirement. Many legal analysts have concluded that the exception does *not* apply to in-house investigations. If this conclusion proves true, the law presents many difficulties for those employers which conduct internal investigations. For example, suppose an employer suspected its bookkeeper of embezzling funds. Many employers would take it upon themselves to investigate the worker's background, either through the internet or other easily accessible sources. In these circumstances, it would seem counterproductive to notify the purported embezzler that an investigation was taking place. But, if some interpretations of the new law prove correct, then that is exactly what the employer would need to do. This particular interpretation is highly debatable and uncertain. Many commentators have predicted additional legislation will be enacted to settle this controversy.

Increased Penalties

The newly increased statutory penalties are also of note. Those who violate any provision of the law are subject to actual damages or \$10,000, whichever sum is *greater*. Attorney's fees plus punitive damages are also available. Clearly, damages can quickly add up for any employer which fails to comply with the law's obligations.

Conclusion

California's new fair credit reporting obligations impose several significant requirements on employers investigating their applicants and current employees. Background checks will undoubtedly continue to play an important role in the California workplace. However, given the potential severity of the penalties and the uncertainty of the requirements themselves, employers should act with great care whenever such an investigative check is conducted. If the employer has any concern whether they are in compliance with this new law, please contact the undersigned or any of the attorneys in our Labor and Employment Practice Group.

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Practice Areas

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