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# Law Report

LEGAL NEWSLETTER

VOLUME 1, ISSUE 1

## APPLICANTS' PRIVACY RIGHTS LIMIT EMPLOYER BACKGROUND CHECKS

*Employers Permitted to Investigate Criminal or Credit History Within Certain Limits*

**D**etermination of an applicant's prospective stability and trustworthiness is an essential part of the pre-employment screening process. While an employer may judge or predict such qualities by background investigations – particularly, criminal conviction history, consumer credit reports, and general character and reputation – California's traditional and constitutional protections of privacy limit employers to gathering information that reasonably bears on job requirements. Further, various federal and state statutory laws regarding access to credit, criminal, and other personal history require that hiring companies must disclose to the applicant when certain background checks are performed, thus giving the prospective employee an opportunity to correct false or misleading data. Employers who violate such rules may be subject to lawsuit for damages and attorney fees.

### SCOPE OF JOB APPLICANT'S PRIVACY RIGHTS

Unlike the federal constitutional right to privacy – which only applies to governmental intrusions into personal matters – California's constitutional privacy right law has been found to apply to private business's efforts to obtain information about employees and applicants. *Loder v. City of Glendale* (1997) 14 *California Reports* (Cal.) 4th Series

846, 59 *California Reporter* (Cal.Rptr.) 2nd Series, 696.

California law permits employers to gather information in good faith regarding prospective employees that is pertinent to the position applied for. For example, a company's traditional

***California privacy law applies to private business's efforts to obtain information about employees and applicants.***

inquiries into an applicant's work history are strongly protected. As long as the communication is not motivated by malice, a prospective employer may freely obtain data regarding a candidate's work performance with a former employer without either company incurring liability to the worker. Civil Code § 47(c).

On the other hand, there are numerous laws issued by the state and federal legislatures and developed by the courts which limit the degree and manner companies may inquire into certain private subject matter, even if the information might be pertinent to the hiring decision. These include protections against arbitrary drug testing, pre-employment medical examinations, polygraph testing, and inquiries into an applicant's character or his medical, criminal, or credit history. See also, Bowles

& Hayes Newsletter, Vol. 4, Iss. 2; "Pre-Employment Testing." On inquiry into character, criminal or credit matters particularly, employers may be prone to inadvertently violating an applicant's statutorily protected privacy rights on a personnel manager's observation that a great deal of such information is public record (e.g., criminal convictions and bankruptcies). It is thus important that company managers are well aware of the limits and procedures for such background checks.

### CALIFORNIA PROTECTIONS AGAINST UNLIMITED CRIMINAL BACKGROUND CHECKS

While California employers may ask an applicant for his conviction record and may research public records for such information, there are some limits to this practice. Hiring companies may not inquire about convictions that have been ordered sealed or expunged by a court. Companies generally may not ask an applicant about convictions for marijuana possession that are more than two years old. An employer may not deny an applicant employment because of a criminal record unless there is a valid business purpose for the decision. For example, a hiring company could decline to hire a person for a treasury function solely on the basis of the prospect's prior conviction for embezzle-

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## PRESERVING INTEGRITY OF EMPLOYMENT SEVERANCE AGREEMENTS

*U.S. Supreme Court Confirms the Eight Points for Valid Severance Agreements under Anti-Age Discrimination Laws*

**A**s earlier reported, where a worker is leaving employment under negative circumstances, written severance agreements exchanging additional compensation for a release of all potential claims will promote, if not virtually guarantee, a permanent parting with no later government complaints or court action. See, Bowles & Hayes Newsletter, Vol. 1, Iss. 3; "Severance Agreements; Providing the Best Chance of Truly Ending the Employment Relationship." The U.S. Supreme Court's 1998 decision in *Oubre v. Entergy Operations, Inc.*, 118 *Supreme Court Reporter* 838, confirms that employers must fulfill eight specific requirements in creating such agreements in order to assure that the federal courts

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*The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.*

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## PRIVACY

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ment. On the other hand, an employer's blanket rule that automatically disqualifies applicants with criminal records – whether or not convictions are job-related – may expose that company to discrimination claims by minority workers where that minority carries a disproportionate percentage of conviction records in the community.

Moreover, except in limited circumstances, California employers may not ask an applicant – or search public files – for that person's arrest record or consider an arrest in any employment decision, unless that arrest lead to a conviction. However, a company may ask an applicant for any arrest on which the prospect is currently awaiting trial. An employer who has violated this law may be liable for the greater of the applicant's actual damages or \$200. If the employer's violation was intentional, liability may be the greater of triple actual damages or \$500, plus court costs and reasonable attorney fees. An intentional violation is also a misdemeanor.

### FEDERAL REGULATION OF EMPLOYMENT-RELATED BACKGROUND CHECKS

The Federal Fair Credit Reporting Act (FCRA) provides employer procedures and applicant protections on obtaining so-called "consumer reports" from agencies that commonly provide such information.

The FCRA carries a broad definition of "consumer report": any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness ... character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part ... in establishing the consumer's eligibility for ... employment purposes ..." 15 USC § 1681a(d). The FCRA also recognizes a more particular "investigative consumer report," as a "consumer report or portion thereof in which the consumer's character, general reputation, personal

characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he acquainted or who may have knowledge concerning any such items of information ..." 15 USC § 1681a(e). The law imposes places greater procedural restrictions on such investigative reports.

An employer who wishes to obtain an investigative consumer report concerning an applicant must first obtain the applicant's written permission. 15 USC § 1681b(2)(B). No later than three days following a request to an agency for such a report, the employer must also notify the applicant in writing that the report is being sought and that the applicant has the right to require the employer to disclose – within five days – the nature and scope of the investigation requested. 15 USC § 1681d.

***Except in limited circumstances, California employers may not ask an applicant for an arrest record unless that arrest lead to a conviction.***

In the event that an employer denies employment wholly or partially on the basis of information in any consumer report – whether or not that report is "investigative" – the company must provide "oral, written, or electronic notice" of the adverse decision while providing the name, address, and telephone number of the consumer reporting agency. Notice is also required of the applicant's right to obtain a copy of the report and to dispute with the agency the accuracy or completeness of any portion of that report. 15 USC § 1681m.

An employer is potentially liable to an applicant for violations of its federal obligations, including the applicant's actual damages, attorney fees, and punitive damages. 15 USC § 1681n.

Obtaining information on a consumer by false representations to a consumer reporting agency is a felony carrying potential fines and up to two years in prison.

### CALIFORNIA REGULATION OF EMPLOYMENT-RELATED BACKGROUND CHECKS

California law provides different definitions than the federal law for background reports obtained from agencies providing such services. In this state, an "investigative consumer report" means a "consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means." California Civil Code § 1786.2(b). Thus, in contrast to the FCRA, an "investigative consumer report" obtained by a California employer *need not* contain information from personal interviews of the applicant's "neighbors, friends, or associates." However, as the federal and state definitions do overlap, an employer must take care to comply with both laws where both apply.

Among the items that normally may be provided in such "investigative" reports are bankruptcies within the past ten years, lawsuits filed and judgments obtained within the past seven years, eviction actions where the tenant was the prevailing party, paid tax liens within the past seven years, accounts placed for collection within the past seven years, and arrest or conviction records within the past seven years. Civil Code § 1786.18(a). However, where the applicant is seeking a job with an annual salary expected to equal or exceed \$75,000, there are no time limits on the age of such information that an agency can provide. Civil Code § 1786.18(b).

When an employer applies to an investigative consumer reporting agency for such a report in making a hiring decision, the company must certify that within three days following the request that employer will have notified the applicant in writing that such a report regarding the person's character, general reputation, personal characteristics, and mode of living will be – or has been – made to that

particular agency. Civil Code §§ 1786.12(e), 1786.16(a).

Then, upon the written request of the applicant within a reasonable time following the employer's notice that such a report is pending, the employer, within specified time limits (normally within five days of the date of the applicant's request) must make a complete and accurate written disclosure to that applicant of the nature and scope of

***If a company denies employment on the basis of an investigative consumer report, the company must notify the applicant.***

the investigation requested. Civil Code § 1786.16(b).

Whenever a company denies employment wholly or partially on the basis of an investigative consumer report, the company must notify the applicant and supply the name of the agency that made the report. Civil Code § 1786.40.

The investigative consumer reporting agency must allow the applicant access to a copy of any report for a minimum of 60 days after that report has been provided to the employer. Civil Code § 1786.11. The applicant may at any time request the investigative consumer reporting agency to inspect and receive a copy of all files the agency maintains on that individual. The agency is required to identify the recipients of any investigative consumer report which the agency has furnished for employment purposes within two years preceding the applicant's request. Civil Code §§ 1786.10, 1786.22.

Through specified procedures, individuals have the right to dispute and direct the correction of inaccurate information concerning them possessed by an investigative consumer reporting agency. If the agency deletes data it agrees was incorrect, then, at the further request of the subject individual, that agency must notify employers and other recipients of previous reports of

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the deletion. If the agency declines to make a requested correction, the subject individual may have included in his file a short statement explaining the dispute. At the further request of the subject individual, the agency must notify employers and other previous report recipients of this action. Civil Code § 1786.24.

An employer that violates any of its obligations under this California law may be liable to the applicant for actual damages or \$2,500, whichever is greater, attorney fees and costs, and, where the employer's violation was wilful or grossly negligent, punitive damages. Civil Code § 1786.50.

## CALIFORNIA REGULATION OF EMPLOYMENT-RELATED CREDIT CHECKS

California employers are subject to different procedures when they seek "consumer credit reports" on job applicants from agencies providing such services. Such report is "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's *credit worthiness, credit standing, or credit capacity*, which is used or is expected to be used, or collected in whole or in part, for ... establishing the consumer's eligibility for ... employment purposes ..." Civil Code § 1785.3(c) (emphasis supplied).

Prior to requesting a consumer credit report, a company must give written notice to the subject individual, informing him or her that the company intends to use such report in the hiring process. The notice must "contain a box that the person may check off to receive a copy of the credit report." The law requires that "[i]f the consumer indicates that he or she wishes to receive a copy of the report, the [employer] shall request that a copy be provided to the person when the [employer] requests its copy from the credit reporting agency. The report to the [employer] and to the subject person shall be provided contemporaneously and at no charge to the subject person." Civil Code § 1785.20.5(a).

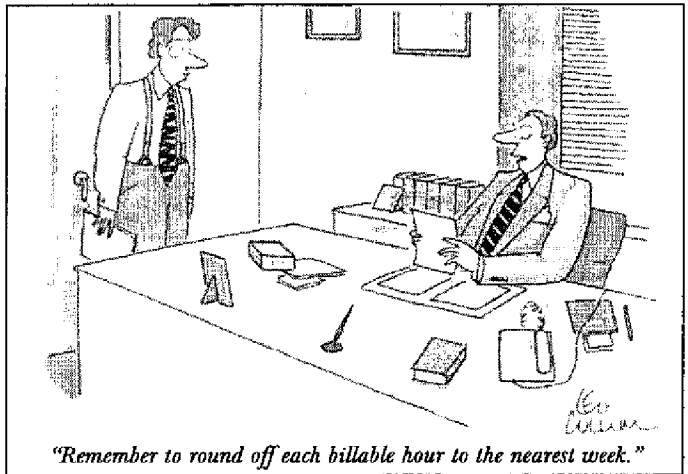
When an employer declines to hire an applicant wholly or

partially on the basis of information contained in a consumer credit report, then the employer is required to notify the applicant of this fact, along with the name and address of the reporting agency that supplied the information. Civil Code § 1785.20.5(a). Further, an employer may in its discretion inform such an applicant that he or she may request the employer to ask the reporting agency to investigate the subject report over any information the applicant contends is inaccurate. Civil Code § 1785.21. In the event of such a dispute, the applicant may then follow various procedures to demonstrate that information in the agency's possession should be corrected. Civil Code § 1785.16.

An employer who negligently violates these notification requirements may be liable to the applicant in a private suit for the applicant's damages, attorney fees, and costs. If the violation was intentional, then the employer may also be liable for punitive damages of up to \$5,000 for each violation. Civil Code § 1785.31. Employers may also be liable for civil penalties of up to \$2500 per violation, plus attorney fees and costs, for gaining access to or obtaining information held by a consumer reporting agency in any manner other than authorized by law. Similar consequences will apply if an employer uses any information provided by such an agency in a way that is not authorized by the agreement between these parties. Civil Code § 1785.19.

## COMPLIANCE WITH SPECIFIC PROCEDURES IS ESSENTIAL

Thus, while employers may legally obtain useful, job-related information that might otherwise be considered private, obtaining "consumer reports" as defined by the federal law and, if in California, acquiring "investigative consumer reports" and "consumer credit reports" require specific procedures and notifications to applicants. Compliance with these hurdles is vital. Otherwise, the value of information provided may be dwarfed by the liability that can arise out of even inadvertent violations of the above laws. ■



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## INTEGRITY

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will not allow a disgruntled former employee to ignore the agreement while investing his or her severance pay in a lawsuit for age discrimination against the company.

Under American common law on contracts, employees who execute severance agreements "knowingly and voluntarily" and in the absence of the employer's "fraud, deception, misrepresentation, duress, or undue influence" will be bound by those agreements. Yet, as confirmed by the Supreme Court in *Oubre*, the Congress, in 1990, imposed eight specific criteria in order to establish that a worker 40 or more years of age has "knowingly and voluntarily" given up his or her right sue any employer (with 20 or more on its payroll) under the Age Discrimination in Employment Act (ADEA). Unless the severance process and release agreement includes the following eight points, that contract will be unenforceable – and the employee can sue for discrimination under the ADEA – even if the worker has pocketed the additional compensation provided as the incentive to enter the release agreement:

1. **Agreement Must Be Understandable:** The waiver must be part of a written agreement "calculated to be understood" by the worker or "by the average individual eligible to participate";
2. **Agreement Must Refer to the ADEA:** The waiver must specify that rights and claims under the ADEA are being waived;
3. **Worker Still Able to Sue on**

**Later Conduct:** The waiver must not release claims arising after the date of the agreement (e.g., unemployment claims);

4. **Compensation Must be in Addition to Monies Owed for Services Rendered:** The waiver is in exchange for anything of value to which the worker is not already entitled;

5. **Worker Notified in Writing of Right to Counsel:** The worker must be advised in writing to consult an attorney prior to signing;

6. **Minimum Twenty-One Day Negotiation Period:** The worker must be given at least 21 days within which to consider the agreement (this period must be at least 45 days if the waiver is requested as part of a "termination program" offered to a group or class of employees);

7. **Seven Day Period to Rescind the Agreement:** The agreement must specify that the worker may revoke the agreement for at least seven days following the signing and that the agreement is not enforceable until the revocation period has expired; and

8. **Additional Disclosure Requirements to a Group of Departing Workers:** If part of a group "termination program," certain other disclosure requirements must be made to workers regarding their eligibility for benefits and the ages and jobs titles for all those eligible or selected.

The defendant Entergy Operations, Inc. contended – and convinced two lower courts – that although the release departing worker Dolores Oubre signed did not contain all of the above required elements, she was never-

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## LAW OFFICE TRANSITION

### *Bowles & Hayes Partnership Dissolves While Principals Maintain Cooperative Relationship*

After over four and a half years of productive association, Tim Bowles and Steve Hayes took stock in their various common and diverse interests and decided that they could each better serve their professional goals and services to the public

by amicably dissolving their partnership. Thus, starting August 1, 1999, Steve began practice as Steven L. Hayes, a Law Corporation and Tim as the Law Offices of Timothy Bowles.

While maintaining a cooperative relationship, including

referral line between the two offices and each servicing existing clients as appropriate, Steve will continue to practice primarily in business and entertainment law as well as in mediation and arbitration while Tim will carry on primarily in the employment and health care fraud areas and in civil litigation.

Tim and Steve each look forward to further enhancing their reach and ability to assist existing and future clients in their respective interest areas through this new arrangement. ■

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theless barred from suing the company for age discrimination under the ADEA because she had kept the \$6,258 paid to her in exchange for the release agreement. The Supreme Court's analysis in favor of the worker was straightforward. Since Entergy did not comply with all criteria for the agreement, by definition Ms. Oubre did not "knowingly and voluntarily" enter that agreement. While Entergy might be able to sue Ms. Oubre for return of the money paid, she had the right to sue under the ADEA.

When done correctly, a severance agreement containing the release and waiver is an extremely valuable document. While it is not an absolute guarantee against a departing employee later making a complaint against the company to a government agency or a civil court, close observance to these procedures provide the best chance for discouraging frivolous suits and for effectively dealing with them if and when they arise. ■

## UPCOMING EMPLOYMENT LAW SEMINARS

We are continuing the successful series of seminars to managers and personnel directors on the legal basics of employment. The following seminars are currently scheduled or being scheduled for the upcoming months:

**Portland, Oregon: Saturday, February 12, 2000:** morning ses-

sion on hire-to-fire fundamentals; afternoon session on workplace policies.

**New York City: Saturday, March 25, 2000:** morning session on hire-to-fire fundamentals; afternoon session on workplace policies.

**Clearwater, Florida; Saturday, April 22, 2000:** morn-

ing session on hire-to-fire fundamentals; afternoon session on workplace policies.

The presentations are accompanied by printed materials and/or forms on employment basics. Recent developments to be covered will be developing federal and state rules on the arbitration of employee discrimination claims. If you or others you know are interested in any of these seminars, please call our offices for specific locations, times, and tuition. ■