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Background Checks*

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*Employment
Law Quarterly*

Law Report

LEGAL NEWSLETTER

VOLUME 2, ISSUE 3

PRE-EMPLOYMENT BACKGROUND CHECKS

Employers Must Obtain Applicant's Written Consent and Provide Several Precise Notices

It sometimes takes hard experience to convince an employer to run background checks on applicants seriously under consideration for key positions in the company.

In one recent instance, a California business preparing to defend an employment-related lawsuit found in the public records a civil complaint – filed against a prior employer just a few years previously – that was in many respects identical to the allegations this later employer was now facing. If the company had performed a routine check for this person's civil litigation history *before* deciding whether to hire him, it may well have never hired this individual, thus saving tens of thousands of dollars in legal defense costs.

Such background checks can and should be done through professional reporting agencies established to promptly check available databases. However, employers must be familiar with the frequently interlocking federal and state rules for disclosure and consent before embarking on the process.

This article outlines the applicable federal and California laws. A more

extensive examination, with an accompanying series of newly drafted model policies and forms for all employer-required notifications, is now available through the June, 2001 issue of our *Employment Law Quarterly*. Please see the accompanying article.

1. Basic Pattern of the Applicable Consumer Reporting Laws: Background checks to assist a California employer in a hiring decision are subject to three major sets of laws: (1) the federal Fair Credit Reporting Act (FCRA); (2) the California Consumer Credit Reporting Agencies Act (CCRAA); and (3) the California Investigative Consumer Reporting Agencies law.

As these laws authorize broad access to credit, criminal, and other personal history, they require that hiring companies: (a) must disclose the intent to seek a report and obtain the applicant's written consent to perform the background check; (b) must notify the applicant of a pending adverse decision based on the information obtained while providing a copy of the report along with a detailed disclosure of the applicant's rights to correct false or misleading data in a reporting agency's files;

and (c) must notify the applicant once such an adverse decision has been made.

Employers who violate such procedural rules may be subject to lawsuit for damages and attorney fees.

2. Sequence of Required Notices and Procedures for Employment-Related Background Checks: The FCRA and CCRAA prescribe employer procedures and applicant protections on obtaining so-called "consumer reports" from agencies that commonly provide such information. These laws define "consumer report" broadly. The FCRA includes 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..."

The federal and California laws also recognize a more particular "investigative consumer report." The FCRA defines this as a "consumer report or portion thereof in

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EMPLOYMENT
LAW QUARTERLY
CONTINUES TO
INFORM AND
PROTECT
EMPLOYERS

Second Issue Provides Complete Set of Model Forms and Policies for Applicant Background Checks

As announced in the preceding newsletter, we have implemented a quarterly subscription service to assist business owners and managers in staying abreast of the continuing developments in employment law. An employer must not only keep up with the constantly changing playing field, but must also ensure that its forms and policies are also up-to-date. This quarterly is intended to aid management in these tasks.

The second issue is now available. In some 100 pages of material, it presents several

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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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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

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with others with whom he acquainted or who may have knowledge concerning any such items of information ...” (emphasis supplied). As they potentially impact the subject individual’s privacy, the law imposes greater procedural restrictions on such investigative reports.

The sequence of FRCA- and California-required documentation on the acquisition and use of consumer reports is:

A. Pre-Request Written Notice and Applicant

Consent: An employer who wishes to obtain a consumer report concerning an applicant must: (a) clearly notify the applicant in writing – in a document that consists solely of the disclosure – that the company may seek such a report; and (b) obtain the applicant’s written permission to seek such a report. California law requires the employer to provide a box that the applicant can check if he or she wishes to receive a copy of the report.

B. Written Notice to Applicant of Request of Investigative Consumer Report:

If the employer intends to obtain an investigative consumer report, the company, no later than three days after the report is requested, must also clearly and accurately disclose in

writing to the applicant (a) the sort of information being sought (e.g., data on applicant’s character, general reputation, personal characteristics and/or mode of living); (b) that the applicant has the right to require the employer – within five days – to make “a complete and accurate disclosure of the nature and scope of the investigation requested”; and (c) a written summary of the consumer’s rights as prescribed by the Federal Trade Commission (FTC). Such notices issued in California must also include a summary of California’s parallel Investigative Consumer Reporting Agencies law.

C. Employer’s Certification of FCRA Compliance to Consumer Reporting Agency:

As a condition of obtaining any consumer report, an employer must certify to the reporting agency that it is seeking the report for permissible purposes and that it has complied or will comply with all requirements for notice and disclosure to the applicant.

D. Notice to Applicant of Intended Adverse Action:

Before an employer can deny an application based in whole or in part on any consumer report, the company must provide the subject applicant with a copy of that report and a written disclosure of the consumer’s rights as prescribed by the FTC. The law does not provide any required duration between delivery of this notice of intended action and the adverse action itself. However, a FTC staff opinion asserts that employers should develop appropriate procedures to allow the applicant’s ability to respond, “keeping in mind the clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken.” December 18, 1997 letter from William Haynes, Esq., FTC Division of Credit Practices, to Harold R. Hawkey, Esq. (*Hawkey*, 12/18/97).

E. Notice to Applicant of Adverse Action: If 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 further provide “oral, written, or electronic notice” of the adverse decision as well as (a) the name, address, and telephone number of the consumer reporting agency; (b) a statement that the reporting agency did not take the adverse action and is unable to provide the applicant the specific reasons for the adverse action; and (c) notice

If the company had performed a routine check for this person’s civil litigation history before deciding to hire him, it may well have never hired this individual, thus saving tens of thousands of dollars in legal defense costs when he later sued.

of the applicant’s right to obtain a free copy of the pertinent report within 60 days and to dispute with the agency the accuracy or completeness of any portion of that report.

3. Additional California Protections Against Intrusion Into Irrelevant, Private Matters:

Unlike the federal constitutional right to privacy – which only applies to governmental intrusions into personal matters – California privacy law (found in its Constitution, statutes and case decisional 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 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.

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 and psychological examinations, polygraph testing, and – as outlined above – overly broad inquiries into an applicant’s character or his medical, criminal, or credit history.

On inquiry into character, criminal or credit matters particularly, employers may be prone to inadvertently violating an applicant’s legally 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). An employer must take care not to overreach on its inquiries into areas of a prospect’s personal life which, in good conscience, an employer could not assert legitimately relate to the hiring decision.

Prime examples are conviction and arrest records. While California employers may ask an applicant for his conviction record – and may research public records for such information – there are

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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 embezzlement. 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

Before an employer can deny an application based in whole or in part on any consumer report, the company must provide the subject applicant with a copy of that report and a written disclosure of the consumer's rights.

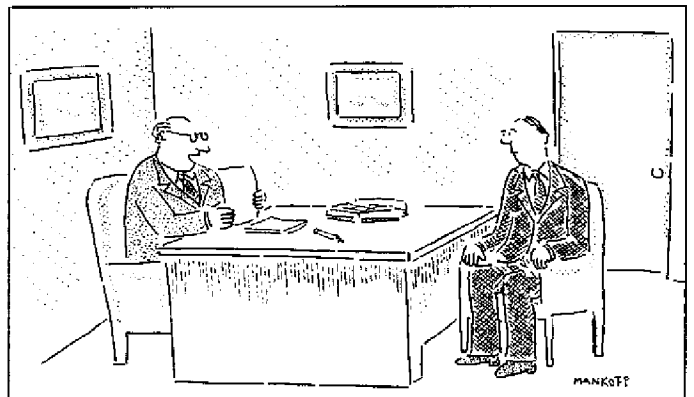
employers may not ask an applicant – or search public files – for that person's arrest record or consider an arrest in any employment decision, unless that arrest lead to a conviction. However, a company may ask an applicant for any arrest on which the prospect is currently awaiting trial. An employer 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.

Perhaps thinking of his or her own personal history, a company representative could readily list a host of other subject areas that would be irrelevant to a hiring decision. If an employer delves into those topics with its applicants, it will be opening itself up to possible litigation for invasion of privacy. The rule-of-thumb should be if the employer does not have a ready, job-related explanation why certain information is pertinent, then that employer has no business delving, notwithstanding seemingly statutory authorization to do so.

The June, 2001 issue of our *Employment Law Quarterly* covers this maze of important laws in greater depth, with an accompanying series of model policies and forms for all employer-required notifications, including all those specified above: (a) pre-request written notice and applicant consent; (b) written notice to applicant of request of investigative consumer report; (c) employer's certification of legal compliance to consumer reporting agency; (d) notice to applicant of intended adverse action; and (e) notice to applicant of adverse action.

All too often, an employer discovers a relevant criminal conviction or civil suit after an erring employee has created disruption and destroyed morale throughout the workplace. We hope you will take advantage of the practical guidance offered by the *Quarterly* toward full protection of an employer's rights to seek pertinent background information on key applicants. Such information may well prove invaluable in the hiring decision. ■



“I gotta tell ya, these embezzlement convictions raise a red flag.”

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important areas of worker-related law through which companies may greatly benefit if they understand and apply prescribed procedures.

Pre-Employment Background Checks; Instruction Memo with Model Forms and Policies: This issue provides an in-depth memo on the law of pre-employment background checks, detailing the compliance steps for employers to obtain applicant's written consent and to provide several precise notices, along with seven model policies and forms to assist management in meeting all legal requirements.

California's New Standards on At-Will Employment: The second issue also offers a memo on a new decision from the California Supreme Court holding that long-term employees have no special, implied rights in the workplace where the company has adequately and consistently documented the “at-will” status of the relationship, along with a newly revised sample employment agreement incorporating these elements.

Information-Sharing with Other Employers on Applicants: The issue includes a memo on company disclosure practices to later employers seeking rec-

ommendations to hire former company workers, along with a newly drafted model policy on the subject and a sample reference consent form and release.

Employment Practices Liability Insurance: The issue also contains an introduction to employment practices liability insurance (EPLI) and an analysis of three model insurance policies that appear to provide superior coverage in this expanding market, along with copies of those three policies.

* * *

Of course, new subscribers will also receive the first issue of the publication, containing articles and complementary model policies and forms on the following topics:

Enforceable Arbitration Agreements: The first issue discusses new decisions from the California Supreme Court and the federal Ninth Circuit Court of Appeals on the required elements required for an enforceable agreement to arbitrate employment-related disputes, along with a newly revised sample employment agreement incorporating these elements and a “redlined” version, showing each of the changes since the last sample form.

California's Revised Wage and Overtime Rules: This issue summarizes the California Industrial Welfare Commission's new regulatory

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orders on minimum wages, overtime exemptions, and work conditions; along with a newly revised sample set of notices and resolutions for the establishing of so-called "alternative workweek scheduling."

Internet, Email, and Computer Access Policy: The issue provides a sample policy defining the proper employee use of company information systems, including Internet access, email, voice mail, and computer data bases.

California's Required Procedures for Changing Published Workplace Policies: This issue also includes a memo on the California Supreme Court's June, 2000 decision concerning when and under what conditions an

employer may cancel or replace major policies affecting employee procedures and benefits, along with a sample notice to employees on such planned changes.

Changes in the Model Employee Handbook: The issue also contains the "red-lined" excerpts showing the recent revisions in this office's model employee policy manual from the last published edition.

With California perhaps the most active American jurisdiction in issuing new and expanding controls on the workplace, this publication will regularly feature this state's particular developments. However, this should now discourage businesses from outside California from subscribing to this service.

First, if an employer meets the stringent standards set for

employee relations by California authorities, then, on consultation with local counsel, that business almost

The second quarterly issue details the compliance steps for employers to obtain applicant's written consent and to provide several precise notices, along with seven model policies and forms to assist management in meeting all legal requirements for background checks.

certainly meets the standards of other jurisdictions.

Second, with the expected growth of subscriber base from

companies outside of California, it should soon become feasible to publish two separate quarterly editions, the first for California employers and the second to service employers outside this state, primarily focusing on changes in the federal law applicable to most hiring companies.

We plan these issues as the first of many, evolving to meet the stated needs of subscribing employers dealing with the continuing major shifts in the law. The subscription rate is currently \$300.00 annually, including copies of the offered model policies and forms provided on disk. Please contact Ray Loomis or Pat Morris in this office. We look forward to serving your business toward achieving full potential in spite of the seeming barriers of regulation. ■