

# Law Report

LEGAL NEWSLETTER

VOLUME 9, ISSUE 3

## PRE-EMPLOYMENT BACKGROUND CHECKS

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

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

In December, 2008, the IRS filed a complaint against a Fry's Electronics vice president alleging the VP had embezzled more than \$65 million over several years through a kickback scheme he had engineered from his office at Fry's headquarters in San Jose, California. The VP allegedly routed the money to casinos in Las Vegas where he already had a reputation with

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police and casinos for his high stakes blackjack play. Demian Bulwa, Matthew B. Stannard, "Fry's Exec Dropped Millions on Gambling," *San Francisco Chronicle*, Dec. 24, 2008. Background checks conducted by Fry's would potentially have

uncovered his history of gambling and lavish lifestyle not in sync with his salary.

In another 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 her, it may well have never hired this individual, thus saving itself tens of thousands of dollars in legal defense costs.

In addition, a California employer can be held liable for negligent hiring if the employer knows the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring the person.

Therefore, it is incumbent upon the employer to take reasonable steps to conduct appropriate background checks to ensure applicants and employees do not present knowable risks to other employees or third parties.

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.

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This article outlines the applicable federal and California laws.

***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 Act.

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Please see "FORMS & HANDBOOK" page 4

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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.

***A California employer can be held liable for negligent hiring if the employer knows the employee is unfit or fails to use reasonable care to discover the employee’s unfitness before hiring the person.***

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.

The FCRA defines “consumer report” broadly to include 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 estab-

lishing the consumer’s eligibility for... employment purposes...”

California’s CCRAA covers a similar “consumer credit reports,” defined somewhat more narrowly as “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...” (emphasis supplied).

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 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...” (emphasis supplied). California’s Investigative Consumer Reporting Agencies Act similarly defines an “investigative consumer report” as a “consumer report in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through any means.” 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:** A California employer who wishes to obtain a consumer report concerning an applicant must (a) clearly and conspicuously 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 appli-

cant’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, at any time before the report is procured or caused to be made, must also clearly and conspicuously disclose in writing to the applicant (a) that an investigative consumer report will be made regarding his or her character, general reputation, personal characteristics and mode of living; (b) the permissible purpose of the report; (c) the name, address and telephone number of the investigative consumer reporting agency conducting the investigation; and (d) the nature and scope of the investigation requested.

***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.***

The employer must also provide a written summary of the consumer’s rights as prescribed by the Federal Trade Commission (FTC) and a summary of California’s parallel Investigative Consumer Reporting Agencies Act, including the applicant’s rights to inspect the agency’s file.

**C. Employer’s Certification of 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

***California privacy law applies to a business’ efforts to obtain information about employees and applicants.***

a copy of that report and a written disclosure of the consumer’s rights as prescribed by the FTC and California law. The law does not provide any required duration between delivery of this notice of intended action and the adverse action itself. However, an 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. Hawkley, Esq. (Hawkley, 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 of the applicant’s right to

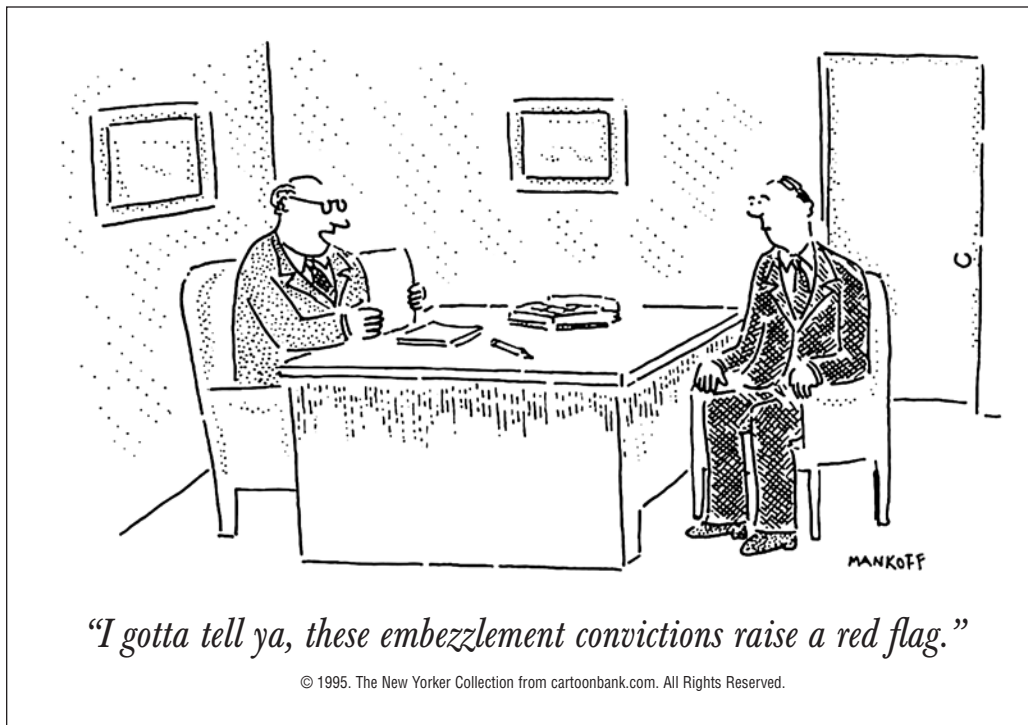
obtain a free copy of the pertinent report within 60 days and to dispute with the agency the accuracy or completeness of any portion of that report.

The above rules do not apply to an investigative consumer report procured or caused to be prepared by an employer if the report is sought for employment purposes due to the employer's suspicion of wrongdoing or misconduct by the person that is the subject of the investigation.

**3. Employer In-House Investigations:** Under California law, employers who conduct their own job reference checks or other investigations without using an investigative reporting agency do not have to disclose the information obtained to the applicant (for example, adverse letters from former employers).

However, California law requires employers who check public records (arrest records, civil judgment, tax liens, etc.) regarding job applicants to provide a copy of the applicable public record within seven days after receipt, unless the applicant is suspected of wrongdoing, in which case supplying the copy may be delayed until the investigation is completed. Applicants may waive the right to receive a copy of this information by checking a box on a job application or other form signifying such waiver. The waiver is not effective and the public records obtained must be provided, however, where the employer takes adverse action (for example, denying or terminating employment) based on information contained in the public record.

**4. 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' 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.*

***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.***

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 infor-

mation – 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 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 employers may not ask an applicant – or search public files – for that person's arrest

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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

*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.*

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 inten-

tional, 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.

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.

Employers should consult legal counsel experienced in employment law for practical guidance and 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. Our office provides legal assistance and forms for all steps discussed above in order to conduct proper background checks under federal and California law. ■

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handbook will reduce your legal liability while providing necessary and useful information to employees about their workplace rights and obligations.

Although employee handbooks and forms cannot take into account every situation that may arise in the workplace, you can reduce the threat of litigation while providing your staff with valuable company information. Such information can prevent future misunderstandings. Help your company improve morale while limiting

potential lawsuits. Don't operate at risk. Avoid lawsuits based on harassment, discrimination or wrongful termination. We encourage all employers to have current policies and supporting employment forms in use. New laws may make your existing personnel forms obsolete.

Call today and place your orders. Currently, our forms cost \$150 and our handbook costs \$300.

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