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Know Thy Hires: Amendments to State Laws Require Employers to Review Their Policies

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The Fair Credit Reporting Act, 15 U.S.C. Section 1681, et seq., is the federal law that governs the acquisition and use of most background information on applicants and employees. Although it is lawful for employers to obtain and use background information on applicants and employees, they must follow several important procedures when obtaining and using these materials. In addition to the requirements under the Fair Credit Reporting Act, the California Consumer Credit Reporting Agencies Act, California Civil Code Section 1785.1, et seq., and the California Investigative Consumer Credit Reporting Agencies Act, California Civil Code Section 1786, et seq., impose many more requirements on employers who conduct, obtain or use background information or investigative reports on applicants and employees. Recent amendments to California law require all California employers, as well as non-California employers conducting background checks in California, to review and revise their related policies and procedures.

Federal Law

The title of the Fair Credit Reporting Act is confusing, as it contains

the phrase "credit report" and is commonly misinterpreted to mean that only credit reports are covered. The act's provisions, however, are much broader and apply to both "consumer reports" and "investigative consumer reports." As defined by the Fair Credit Reporting Act, consumer reports are reports prepared by a consumer reporting agency, like Equifax, that bear on an applicant's or employee's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living, when such information is used or expected to be used or collected in whole or in part for "employment purposes."

"Employment purposes" include hiring, termination, reassignment or promotion of any applicant or employee.

Almost any communication of information concerning an applicant or employee from a consumer reporting agency to an employer is potentially a "consumer report."

Common examples of consumer reports include Department of Motor Vehicle records check, criminal background checks and credit history checks when this information

is obtained from a consumer reporting agency. Under certain circumstances, drug test results may be considered "consumer reports."

"Investigative consumer reports" under the Fair Credit Reporting Act are a subset of consumer reports in which information on a applicant's or employee's character, general reputation, personal characteristics or mode of living is obtained through personal interviews with the applicant's or employee's friends, neighbors or business associates.

Common examples of investigative consumer reports are employment verifications and interviews with former employers and co-workers when these are performed by a consumer reporting agency.

State Law

The California Consumer Credit Reporting Agencies Act applies to "consumer reports," which are defined by this statute to essentially mean credit reports. See California Civil Code Section 1785.

The California Investigative Consumer Credit Reporting Agencies Act defines "investigative consumer

report” much more broadly than the Fair Credit Reporting Act. California Civil Code Section 1786.2(c). An investigative consumer report under the California Investigative Consumer Credit Reporting Agencies Act is defined 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.

This definition specifically excludes “consumer reports” under the California Consumer Credit Reporting Agencies Act (credit reports) or other compilations of information that are limited to information about a consumer’s credit record, which are governed by the California Consumer Credit Reporting Agencies Act.

Unlike the Fair Credit Reporting Act, the California Investigative Consumer Credit Reporting Agencies Act does not limit the definition of investigative consumer reports due to those obtained through personal interviews by third-party agencies.

The convergence of the Fair Credit Reporting Act with these two California statutes creates a potentially bewildering maze of overlapping and inconsistent obligations and rights. However, if you follow the four basic steps below, compliance with both federal and state requirements should be relatively simple for employers covered by all three statutes.

Step One: Disclosure and Written Consent

Before requesting a consumer or investigative consumer report from a consumer reporting agency, an employer must do the following:

- Provide the employee or applicant a clear and conspicuous disclosure that a consumer report or investigative consumer report may be requested, and notify employees or applicants of the extent to which they will receive copies of reports. This must be provided in a “separate document” that does not refer to other subjects.
- Obtain prospective written authorization from employees and applicants.

Step Two: Certification to the Consumer Reporting Agency

Under the Fair Credit Reporting Act, the California Investigative Consumer Credit

Reporting Agencies Act and the California Consumer Credit Reporting Agencies Act, before obtaining an investigative consumer or consumer report, the employer must provide certification to the consumer reporting agency.

Most, if not all, consumer reporting agencies will request that the employer sign their certification agreement. Employers should review these agreements carefully to ensure minimum compliance with applicable law and prevent incorporation of undesirable, additional requirements. The combined requirements of federal and state law dictate that the certification from the employer must contain the following:

- The disclosures required for consumer reports have been made to, and written consent has been obtained from, the applicant or employee who is the subject of the requested report.
- The additional procedures required by the Fair Credit Reporting Act (and the California Consumer Credit Reporting Agencies Act) in the event of a potential adverse action will be followed before any adverse action is taken.
- The employer will provide copies of any investigative consumer reports to the applicants or employees investigated as required by the California Investigative Consumer Credit Reporting Agencies Act.
- The information from the consumer report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation;
- The additional disclosures required concerning requests for investigative consumer reports have been issued as required by the Fair Credit Reporting Act. (The agency must receive this certification before it can prepare or furnish the investigative report).
- The employer will comply with applicable requirements that additional disclosures be made on request from individuals on whom investigative consumer reports have been requested.

Step Three: Provide Copies of Reports and Wait a Reasonable Amount of Time Before Taking Adverse Action

Unlike employers subject only to federal law, a California employer must provide an applicant or employee with a copy of any investigative consumer report (which excludes

credit reports, under California law), regardless of whether the report influences a decision not to hire an individual or a decision to take any type of negative or adverse employment action against a current employee. An adverse employment action includes failure to hire or promote or a demotion, suspension or termination.

The employer must provide the applicant or employee with a copy of the report, either at the time of meeting or interview with the applicant or employee or within seven days of receiving the report, whichever is earlier. California Civil Code Sections 1786.16(a)(2), 1786.16(5)(b).

The California Consumer Credit Reporting Agencies Act allows employers the option of requiring applicants or employees to “check the box” requesting that the consumer reporting agency provide a copy of the consumer report at the same time that agency provides it to the employer at no charge. California Civil Code Sections 1785.20.5. This copy, if requested, must be provided, regardless of any intended adverse action based on the report.

Under the Fair Credit Reporting Act, copies of such credit reports and any other consumer reports must be provided, regardless of any request, where adverse action is contemplated. The Fair Credit Reporting Act additionally requires that a summary of Fair Credit Reporting Act rights be provided along with copies of any reports and that the employer waits a reasonable amount of time before taking adverse action.

Step Four: Notice After Adverse Action

After the employer has provided copies to the applicant or employee of the consumer and investigative consumer reports and the summary of Fair Credit Reporting Act rights and waived and “reasonable” time period it has decided to establish, the employer may take adverse action. After taking such action, the employer must provide an adverse action notice. It is recommended that the employer provide the employee notice in written form to show compliance with the law. The adverse action notice must contain the following:

- The name, address and telephone number of the consumer reporting agency (including a toll-free telephone number es-

tablished by a national agency) that provided the report.

- A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to inform the consumer as to the specific reasons why the adverse action was taken.

- A statement of the consumer's rights to obtain a free copy of the report from the consumer reporting agency making a request within 60 days of receiving the adverse action notice. This statement may be somewhat confusing, because the applicant or employee has obtained a copy of the report from the employer at this point, under separate legal provisions. Therefore, it is suggested that this statement indicate that the individual is entitled to obtain an additional free copy of the report from the agency.

- A statement of the consumer's right to dispute with the consumer reporting agency the accuracy or completeness of any information in the report.

Guidelines for California Employers Conducting Their Own Background Checks

While, under federal law, an employer performing its own background check can avoid compliance, the recently amended California Investigative Consumer Credit Reporting Agencies Act requires that even employers must comply with certain disclosure requirements that had until now never existed.

Specifically, the California Investigative Consumer Credit Reporting Agencies Act now dictates that, when an employer "collects, transmits, transfers or communicates" information about job applicants or employees for employment purposes, such information must be provided to the individual at the time of the meeting or interview with the applicant/employee or within seven days of the date the employer receives the information, whichever is earlier, California Civil Code Section 1786.53.

This provision may be interpreted to require that even simple reference check results be provided to job applicants. Unless and until the act is clarified not to require such a procedure, the following steps are recommended:

- In conducting an investigation, such as confirming prior employment and educational history or contacting references, use standardized forms, which allow the person

conducting the investigation to fill in the appropriate information and keep a record from which information for the applicant may be summarized.

- Train personnel conducting reference checks to avoid unlawful pre-employment inquiries. Questions that would be unlawful to ask applicants or employees are likewise unlawful to ask references or third parties.

- If the employer obtains a report from a third-party public or private records source, such as the Department of Motor Vehicles or criminal or educational records, the employer should provide the applicant or employee with a copy.

- At the time of the meeting or interview with the applicant or employee or within seven days of obtaining the information, whichever is earlier, send a standardized letter that summarizes the information obtained during the investigation or background check. This summary need not reveal the sources of the information.

Where information related to reference checks or other inquiries may be received or developed over time, it is recommended that a communication advising applicants or employees that they may request information from the employer's investigative file at any time but will receive a summary of the information received within seven days after the file is complete. In this manner, the employer can avoid the need for a letter or other communication every time new information is received but before the file is complete.

- Avoid providing references to prospective California employers beyond confirmation of dates of employment, last position held and most recent pay information. Given that summaries of any references to California employers may now be disclosed to applicants and employees in writing, this standard advice should be reiterated and confirmed through a published policy and training.

- Protect the confidentiality of comprehensive reference check and criminal investigation files contained in personnel files. Under California Civil Code Section 1198.5, an employee is not entitled to review such records contained in the personnel file.