

The Request and Use of Background Checks by California Employers

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Many employers routinely conduct background checks of potential and current employees. It comes to no surprise that in the current digital age, employers can obtain extensive background information on applicants and employees quicker than ever from third party reporting companies. However, employers must remain vigilant to avoid receiving information prohibited under federal, state, and local laws, and to follow the proper procedures. This blog provides a brief overview.

Reporting Laws. The Federal Fair Credit Reporting Act of 1970 (FCRA)¹ governs employment-related background checks conducted by outside reporting agencies. The FCRA regulates “consumer reports,” which pertain to creditworthiness, credit capacity, character, reputation, and mode of living. The FCRA also governs “investigative consumer reports,” which contain information about a person’s character, reputation, and mode of living obtained through personal interviews with friends and other people familiar with the consumer.

Two California statutes, the Consumer Credit Reporting Agencies Act (CCRAA)² and the Investigative Consumer Reporting Agencies Act (ICRAA)³ address credit and character background checks respectively. The ICRAA covers employers who do their own background checks, in addition to third party screeners. The CCRAA bars employers from running credit reports on applicants unless the applicant is applying for a specific position, including, but not limited to, a managerial position, a position involving regular access to financial information, social security numbers, and birthdates for individuals, and a position involving access to an employer’s bank account, credit, or cash totaling \$10,000 or more.

In addition, cities such as San Francisco and Los Angeles, have begun enacting their own, more stringent, background check (“ban the box”) requirements, barring employers from collecting and acting on additional background information.

Other California laws also limit the types of information employers can collect, and rely on, in making personnel decisions (hiring, promoting, terminating, etc.) including, most recently, a prohibition from asking applicants to disclose salary history.⁴ Employers need to be mindful when working with outside investigative or reporting agencies to do reference and background checks to make sure that they are not seeking prohibited information, or reporting it back to the employer.

Notice Requirements. A California employer must provide specific written notice to applicants and employees regarding *each* background check requested for employment purposes. This notice should be a standalone document that includes a box for the applicant or employee to

¹ 15 U.S.C. § 1681, *et seq.*

² Cal. Civ. Code, § 1785.1, *et seq.*

³ Cal. Civ. Code, § 1786, *et seq.*

⁴ Labor Code §§ 432.3 and 1197.5

check off to receive a copy of the report. A notice and opportunity to see the public records retrieved is required if the employer is conducting the investigation in-house, and consent is required if the employer is using a third party agency. Employers need not receive permission or give notice if a background check is being conducted on an existing employee suspected of wrongdoing or misconduct, but this carve-out should not be abused.

Consent Requirements. Depending on the type of background information an employer is seeking, the employer may need the applicant or employee's advance written consent.

- **Financial/Credit Background:** Under both the FCRA and CCRAA, an employer does not need advance written consent to obtain a report solely pertaining to the financial/credit background of the applicant or employee. However, the credit reporting agency conducting the check must obtain the employee's consent to release the report to the employer.
- **Character/Personal Information:** The FCRA and ICRAA both require that a California employer obtain the applicant or employee's advance written consent to obtain a report on his or her character and personal information.
- **Financial & Character Background:** If a background check seeks information touching on both creditworthiness and character background, a California employer must obtain the applicant or employee's advance written consent.⁵

Criminal Records. California employers may not ask applicants to disclose information concerning arrests that did not result in convictions. Employers may still ask about convictions and arrests for which applicants are out on bail or on their own recognizance pending trial. Under California's "ban the box" law, which went into effect on January 1, 2018, employers with five or more employees may not consider an applicant's criminal history until the employer makes a conditional offer of employment. Accordingly, employment applications cannot request disclosure of an applicant's conviction history.

Adverse Actions Based on Criminal History. With some exceptions (such as for positions involving firearms, operators of residential care facilities for the elderly and the facility's employees⁶, some health care facilities, and some occupations that require a state license), California employers cannot use most non-felony criminal records and related information when making hiring, promotion, training, discipline, lay-off, termination, and other employment decisions. Employers generally may not seek or consider the following criminal information:

- An arrest or detention that did not result in a conviction (except for pending arrests);
- Felonies more than seven years old;
- Information about a referral or participation in a criminal diversion program;
- A conviction that is judicially expunged, sealed, or dismissed;

⁵ See *Connor v. First Student, Inc.* (2018) 5 Cal.5th 1026, 1038.

⁶ Cal. Health and Safety Code, § 1569.17.

- Any information while the applicant or employee was subject to the jurisdiction of a juvenile court⁷; and,
- A non-felony conviction for possession of marijuana that is two or more years old

In addition, the cities of San Francisco and Los Angeles prohibit employers from considering information about convictions that have been sealed, dismissed, expunged, or otherwise nullified. San Francisco also bars employers from considering convictions for crimes that have since been decriminalized.

Employers may not consider an employee's criminal history in employment decisions if doing so will result in an adverse impact on individuals within a protected class (i.e., gender, race, and national origin).

If an applicant or employee decides to claim adverse impact discrimination based upon a policy of refusing to hire or terminating employees if they have a criminal conviction, he or she will have to show an adverse impact on a protected class. The employer will need to be prepared to establish that the conviction policy is nonetheless justifiable because it is job-related and consistent with business necessity.

The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific job, not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, the employer must demonstrate that the policy or practice is appropriately *tailored to the particular job*.

If the employer's policy or practice is challenged, adversely impacted applicants or employees may still prevail if they can demonstrate that there is a less discriminatory policy or practice that would have served the employer's goals as effectively as the challenged policy or practice. Employers, therefore, should consider whether conducting a broad background check is really necessary, or whether there is another method available, such as a more narrowly targeted background check (for example, seeking only certain types of convictions related to the job duties) or another form of inquiry that evaluates job qualification or risk as accurately.

Takeaway for Employers. Employers who use background checks as a part of their qualification process for applicants or employees, should ensure that they provide the proper written notice. Employers should also carefully evaluate what type of information they reasonably need to obtain, and communicate this limitation clearly to the person or third party agency creating the report, in order to ensure that they obtain only the information they are allowed to consider.

Employers who consider criminal conviction history in their employment decisions should be aware of the restrictions on the types of criminal history that they can lawfully obtain under California law, and should make sure that they are aware of any local ordinances that may apply.

⁷ Cal. Labor Code, § 432.7.

Before an employer takes any adverse action against an applicant or employee based on his or her criminal conviction history, the employer needs to carefully analyze the particular job at issue and its connection to the criminal conviction information sought, and be sure to confirm whether an applicable ordinance or law requires the employee or applicant to be given notice and an opportunity to explain any mitigating factors or contest the validity of the information. Employers who have questions about navigating these overlapping rules and ordinances should consult their preferred Weintraub employment attorney.