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(See announcement below)



DEMYSTIFYING CALIFORNIA'S NEW "BACKGROUND CHECK" LAW (March 14, 2002)

The California legislature has planted a new landmine for the unwary employer in the form of Assembly Bill 655, which amended the California Investigative Consumer Reporting Agencies Act (California Civil Code § 1786 et seq.). Although the amendments were publicized as addressing the growing problem of identity theft, several provisions will affect employers' practices in connection with background and reference checks, and perhaps even internal investigations.

In many respects, California's law mirrors the requirements of the federal Fair Credit Reporting Act (FCRA). For example, both laws require that employers obtain the written consent of an applicant or employee before a consumer report is obtained, and both require employers that request a consumer report from an outside agency to certify to the agency that they will comply with the statute's provisions. A "consumer report" is defined as any report in "which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means." This information may be gathered on-line, through personal interviews or through public records. In the employment context, background checks often include searches of criminal records or bankruptcy filings, employment verification, and reference checking.

However, after the recent amendments, state law now imposes significant new requirements on employers over and above the federal requirements. Most significant is the requirement that any employer who obtains a consumer report for employment purposes must provide a copy of the report to the applicant or employee. Another section of the new law requires employers to provide to the applicant or employee information gathered about the individual, *even if the employer gathers the information without using an outside agency.*

The new law does have some changes that are favorable for employers. Most importantly, under state law, an employer who retains an agency to conduct an investigation based on a "suspicion of wrongdoing by the subject of the investigation" does not have to provide the employee with advance notice the investigation is being conducted. Unfortunately, if such an investigation uses interviews to gather this information, federal law still requires advance notification. Hopefully, Congress will amend the FCRA to remove this requirement and conform the requirements of state and federal law. Advance notice of internally-conducted investigations is not required under either state or federal law.

What does this mean for employers?

Any employer which *uses an agency* to run a background report on an applicant or an employee for any employment purpose must:

1. Obtain written consent from the applicant or employee to undertake the background investigation (this may be obtained at the application stage);
2. Provide the applicant or employee with written notice that a report has been requested within three days of the employer requesting or undertaking the background report. This notification must include the name and address of the investigative agency (if any), the nature and scope of the information requested, and a summary of the employee's rights to obtain the report. Federal law requires that notification must be contained on a separate document. As noted, while the new state law provides an exception to this notification requirement in connection with misconduct investigations, federal law does not;
3. Provide the agency preparing the report with a written certification that the employer will comply with applicable provisions of state and federal law;
4. Provide a copy of the background report to the applicant or employee at the time of the meeting or interview with the employee or applicant, or within seven days of the date the employer obtains the information, whichever is earlier.

For *employer-conducted* background checks or investigations, if information is gathered about an employee's personal characteristics, character, reputation or mode of living, employers must now provide the information it gathers to the applicant or employee. This means that an employer which conducts its own reference checks (over and above mere employment verification) or undertakes a "do-it-yourself" internet background report of an applicant or employee, is required to provide the information it has gathered to the applicant or employee on the date of the meeting with that individual, or within seven days of the date the employer obtains the information, whichever is earlier. This requirement would not apply to mere verifications of employment or salary, but may apply to inquiries as to whether an applicant is eligible for rehire with a prior employer.

The new law raises a more difficult question with respect to misconduct investigations. If, during a misconduct investigation, the employer gathers information about an employee's personal characteristics, character, reputation or mode of living, state law now requires that the information gathered must be provided to the employee on the date of the meeting with the employee, or within seven days of the date the employer obtains the information, whichever is earlier. The new law does *not* require that the employer prepare a written report containing the "information," but it also does not specify exactly what "information" must be provided or how it must be provided to the employee. Employers should consult with legal counsel before conducting any internal investigations that might trigger this requirement.

In short, employers should beware! Employers should take care to ensure compliance with **both** federal and state law any time a background report is requested on an applicant or a current employee, including obtaining written consent, providing notice to the employee, and providing a copy of the report to the employee. In addition, whenever employers gather information about an applicant's or employee's character, reputation or mode of living, the information must be provided to the employee.

If you have any questions about this E-Update, please contact Fred Plevin, Mike Sullivan, or any PPS&C attorney at 619-237-5200.

ANNOUNCEMENT

Paul Plevin & Sullivan LLP is pleased to announce the change of the firm's name to

Paul, Plevin, Sullivan & Connaughton LLP

to recognize E. Joseph Connaughton, a founding partner of the firm, for his contributions to the firm's success.

The firm will continue to serve California employers by providing advice and training in all aspects of labor and employment matters, and by representing employers in employment-related litigation.

This E-Update is offered as general information to our clients and friends. The Update is not intended as legal advice applicable to any specific situation and should not be taken as such.

Send comments to info@paulplevin.com. Last modified 3/14/02