

A “California-Size” Challenge— Being Smart About Background Checks When California Law Applies

Continuous Monitoring



Orange Tree

Why Does California Matter So Much?

1. Detailed State Law Requirements
2. High Damage Potential For Technical Mistakes
3. Hotbed For Litigation At Federal and State Level
4. Left-Leaning Judiciary

How Do You Know Whether California Law Applies?

- Statutes and case law tend to give indefinite answers
- Most industry experts say CA law applies if:
 - Candidate/Employee resides in CA, **OR**
 - Candidate/Employee will work in CA

Practical Tip: Best to assume that CA law applies if individual has connection to CA

Which Background Screening Areas Require Special Treatment?

Written Consent For Checks (FCRA)

- **9th Cir.** (Fed appeals court covering CA) now interpreting FCRA consent requirements in narrow, inflexible way
- **9th Cir:** Disclosure regarding background checks cannot include reference to:
 - Background screening state law notices
 - Governmental notice entitled “A Summary of Your Rights Under the FCRA”

Practical Tip: All Employers should:

- Take fresh look at screening consent materials
- Involve legal counsel
- Remember: Generally, “less is more”

Written Consent For Checks (Cal. Supplement--Part 1)

- **CA Requires Stand-Alone Disclosure Beyond FCRA Disclosure**
 - Different definition of “Investigative Consumer Report”
 - Statement that report may include info on consumer’s “character, general reputation, personal characteristics, and mode of living”
 - Name, address, and telephone # of CRA running report
 - Location of CRA’s Privacy Policy
 - Summary of Rights Under Cal Civ. Code 1786.22
 - Checkbox for consumer to obtain copy of report

Practical Tip: California requirements likely to come under more scrutiny in light of recent 9th Circuit decision (*Gilberg*)

Written Consent For Checks (Cal. Supplement--Part 2)

- **CA Requires Employers to Provide Additional Info If Doing Credit Check**
 - Must disclose in writing specific basis under state law why credit check allowed
 - Only 10 or so permissible bases to conduct credit checks
 - Most common ones relied upon by employers:
 - Managerial position
 - A named signatory on employer bank or credit card account

Practical Tip: Obtain credit checks only for a handful of positions.

Criminal Info That Is “Off Limits”

- **Under CA law, employers cannot base an employment decision on:**
 - Pre-trial diversion info
 - Certain Marijuana-related offenses (e.g., dated misdemeanors)
 - Juvenile offenses
 - Non-convictions (unless pending charges)
- **Under CA law, employers generally cannot review sex offender registry information**
 - Can only consider sex offender registry information to “protect” a “person at risk”
 - This is among the most limiting laws in country
- **Under San Fran law, can only consider convictions for 7 years**

Practical Tip: Do not make any assumptions about what California allows

Analyzing Potentially Usable Criminal History Information

- **1st Step**: Before deciding to take action, employers must evaluate:
 - Nature and severity of offense
 - Nature of job sought
 - Amount of time passed since offense
- **2nd Step**: If reach preliminary decision that job-related, examine any evidence supplied by candidate as to rehabilitation/mitigating circumstances

Practical Tip:

- Confer with counsel regarding one or both steps as needed
- Consider written questionnaire to satisfy 2nd step

Adverse Action Letters

- **State law requirements go beyond FCRA. For example:**
 - Employers must provide specific information in pre-AA correspondence
 - Including part of report causing potential AA
 - Right of applicant to submit additional evidence regarding rehab/circumstances
 - Note: Allow at least five business days to respond
 - Employers must provide specific information in post-AA correspondence
 - For example:
 - Part of report causing AA
 - Right to file a complaint with DFEH
- **Some municipalities have additional requirements:**
 - Los Angeles: Specific form must be completed

Practical Tip: Double-check current adverse action letters/procedures to ensure accounting for California laws!

Other Unique Items

- Must wait until conditional offer stage to run criminal history check
- Can't require job applicants to pay for criminal checks
- Must provide free copy of requested report within three days

Practical Tip: Do not make assumptions about what California allows/requires

Further Information

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