

Which State Law Applies?

The question of which state law applies to a consumer report is a very common question. For example, a California resident applies to work for an Illinois company to work in a location in the State of Mississippi. Which state law applies? This involves the area of the law known as conflict of laws. The legal issue becomes which state has the greatest interest in governing the particular situation at hand? Is it California, where the consumer lives; Illinois, where the home office of the employer is located or is it Mississippi, where the consumer will work?

At the time of this writing there are no cases specifically dealing with the conflict of laws resolution in the context of the FCRA. However, the FCRA and state analog rules are similar to employment laws, i.e. antidiscrimination laws, and there are many cases deciding which such law applies to a given work situation. The general rule is that the law of the state where the person works will apply over other choices. In our scenario above, this would mean that the law of Mississippi would apply. That result makes sense. Let's assume an employer is recruiting nationwide for the Mississippi project. As a result the employer has hired people from 15 different states. The company could not manage its work force if it had to apply 15 different sets of employment laws. Since we are dealing with the employment of people within the state, that state has a great interest in assuring that those working in the state are being treated equally and appropriately according with its laws. Those interests, say the courts, generally outweigh any other interests of other states that have a connection to this transaction.

Watch for Exceptions

As always, in the law, there may be exceptions. If the Illinois company actually required each employee to come to Illinois, be interviewed, and have their background check done at that time, and they made their hiring decision in Illinois, then the law of Illinois might apply to the hiring, background search, but once employed subsequent background searches would be governed by Mississippi law. Why would that be an exception? This is because the actual act of hiring and the actual act of background screening occurred in the State of Illinois. If the individual did not pass the background check, then Mississippi would never come into consideration.

What about employees who have no set place of work, such as truck drivers, traveling construction crews, traveling sales people? Obviously this can get complicated and the answer to the question is not truly subject to an all encompassing analysis because the facts of the particular case will probably control the result. At the risk of violating what we just stated, a rule of thumb in these cases is often that employees are governed by the law of the location from which the employer controls the employee. Such as the truck terminal, regional office, etc.

Why is this important on the state analysis/FCRA issue? For example, if the Illinois employer opts to use California law, which prohibits an employer from using information from a pre or post trial diversionary program, the search would not turn up records for these offenses. If this person has "multiple convictions" but all were dealt with via a diversion program, then these would not be reported either to an Illinois employer even if applying Mississippi law. However, in our case, Mississippi will allow the reporting of the charge; guilty plea an eventual dismissal (for 7 years, per the FCRA), but because of California law, the employer does not get the criminal record and then after being hired, the employee commits the same crime. Mississippi does not care about California restrictions and the employer cannot expect to successfully convince a jury that it was okay not to request a criminal record in light of the grave injury that has occurred to the Plaintiff. It is an easy argument to indicate that if the employer had looked, Plaintiff's injuries and/or death could have been avoided if the employer had seen the employees California record. This would be the nightmare situation for an employer.