About California

California is of special significance because California laws are considered by many to be both confusing and considered overwhelming. Therefore it is critical for both CRAs and employers to be very careful in their employment screening procedures in this state.

Terminology and Pre-emption with Federal Law

As of September 30, 1996, what California law refers to as Investigative Consumer Reports the FCRA refers to as Consumer Reports. Currently, per §1785 of the California Civil Code, an Investigative Consumer Report is any report other than a credit report.

Several statutes in section 1786 of the Civil Code were enacted after September 30, 1996 and appear to be subject to FCRA pre-emption. While no court has ruled on this issue as of this date, at least one court has ruled that another section of §625 pre-empts California law, e.g. Brown v. Mortensen, 181 Cal. App. 4th 789, 105 Cal. Rptr. 3d 462 (2010). However, since 1786.50 sets a $10,000 per violation civil fine, it is not advisable to taking the risk that the statutes are pre-empted until there is a decision on this precise issue. However this may provide a viable defense if you do report records beyond current restrictions.

1. Restrictions on CRAs

Restrictions Under §1786.18 & §1786.28

- Convictions can be reported for only 7 years.
- Non-conviction information cannot be reported except for pending charges.
- Unlawful detainer (evictions) where consumer prevailed or where action is resolved by settlement cannot be reported.
- Criminal record information must be current and up to date in reports for employment purposes. Thus databased records cannot be used for employment reports. See Sec 1786.28.

Exception:

- A report may provide additional information even if otherwise prohibited if the employer is required by some other law to check for records prohibited by 1781.18(a). See 1786(b)(2)

Restriction under §1786.20(c), (Enacted in 1998):

CRA may not report information to an employer that would violate any applicable federal or state equal employment opportunity law or regulation.

(Obviously this is a vague standard.)

Salary Cap Restriction

None. ($30,000 pre-September 30, 1996)

The Consumer Authorization Box

- The Consumer Authorization form must contain a “box” for the consumer to check in order to elect to receive a copy of the report.
- The report is to be sent to the consumer within 3 business days of the receipt by the user. §1786.16 CA Civil Code.

The Consumer Authorization Form Must Include the Following:

- That an investigative report may be obtained.
- The permissible purpose of the report.
- That the report may contain information on the consumer's character, general reputation, personal characteristics and mode of living.
- The name, address and telephone number of the CRA.
- Notice of rights under §1786.22 (usually known as the California Notice of Rights in English and Spanish). These are a little long to be in the Authorization form, so they must accompany the Authorization.

Privacy Policy

The authorization must also list the CRA's website address if the CRA has one. §1786.16(a)(2) (B)(vi). Such website must include a statement regarding the CRA's privacy practices. §1786.16(d). If the CRA does not have a website then the privacy practices must be written and furnished to the consumer upon request. That statement must indicate whether the consumer's personal information will be transferred to third-parties outside of the USA or its territories. The legislation has an unusual definition of a "third-party" as it includes a: contractor, foreign affiliate, wholly owned entity or an employee of the CRA. §1786.20(d)(2). Finally, the CRA is liable for any security breach that occurs overseas with the "third-party." Damages do not include statutory damages but only actual damages plus attorney fees. §1786.20(e).

(SB 909 signed September 29, 2010)

Text Guidelines on the Report

§1786.29 requires the following 2 notices to be on the front page of any investigative consumer report:

CALIFORNIA REPORT WARNING

(Must be in 12-point boldface type)

> "This report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records, and information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of the report."

1786.29(b) Notice

(Need not be in Spanish)

The agency providing this report will provide, when contacted by the consumer seeking a copy of this report or making a request to review his/her file with the agency, a written notice in English and Spanish setting forth the terms and conditions of his/her right to receive disclosures of information such as office hours, any charges for disclosures, identification required for the release of information, names of recipients of reports on the consumer, what assistance is available to the consumer in reviewing/understanding the information and similar instructions.

More on California Notice of Rights - §1786.10, §1786.22 and §1786.26

When the consumer's consent is obtained to obtain a report and when requested by a consumer, the CRA must provide this summary of rights in English and Spanish.

When contacted by the consumer the law does not specify how the Notice of Rights is to be delivered. Contact by mail or email would seem to comply.

Credit Related Report Restrictions

Under 1785.13 - (Beyond the restriction for investigative consumer reports 1786.18 Civil Code):

- No exception for pending criminal charges;
- No report of a conviction that that has been pardoned;
- Other adverse information not older than 10 years;
- No medical information without specific consent of consumer;
- If open-end credit account is closed by the consumer, the report must state that it was closed by the consumer;
- The report must include overdue child or spousal support if it has been reported.

Under 1785.18

- Similar prohibition to providing public record information that is not up to date at the time of the report is reported, thus requiring current records – no database records to be used.

About Investigative Consumer Reports:

Although California has blurred the distinction between CRs and ICRs, the following are of note for typical ICRs in California:

- Tenant screening - notify tenant of ICR within 3 days of request for report.
- Employee misconduct – no need for consent to investigate "wrong doing on misconduct by the subject."
- Insurance notice of ICR can also be in application form, medical form, binder or similar document. Civil Code §1786.16.

2. Restrictions on Users

Employers may not ask or consider:

- Non-conviction matters except pending matters California Labor Code §432.7(a).
- Any participation in any pretrial or post-trial diversion programs §432.2(a).
- Certain convictions involving 28.5 grams (1 oz.) of marijuana that are more than 2 years old, Labor Code §432.8; Health and Safety Code §11357.
- Sex offender information only if the employer has people “at risk”. Penal Code 290.4(d)(1). There is no definition of who is a person at risk, but the statute is an attempt to prohibit blanket disqualifications of those on a sex offender list. However a CRA is allowed to report this information under freedom of speech. Mendoza v. ADP Screening, 182 Cal. App. 4th 1644 (2010).
- Disclosure of a username or password for the purpose of accessing personal social media, including access of personal social media in the presence of the employer. Per AB 1844. Not yet codified to the Labor Code.

Ban-the-Box: City Restrictions

Numerous California cities, towns and counties have enacted their own ban-the-box laws. Undoubtedly there is no consistency among these laws. The mega metropolitan areas of Los Angeles and San Francisco have enacted their own laws that directly impact what/how CRAs will operate. The Los Angeles ban-the-box is covered in a January 10, 2017 alert. Please read for details. Of particular note is the requirement to identify the disqualifying criminal record(s). San Francisco enacted its own ban-the-box. This is outlined in the Alert of August 14, 2014. Again, the disqualifying criminal record(s) must be identified. There are special notices for

employers. San Francisco has also enacted restrictions on the use of criminal records for tenants. See Alert March 5, 2014.

Ban-the-Box: State Restrictions

The state of California formally enacted its version of ban-the-box in 2017. The details are listed in our November 1, 2017 Alert. This new law requires a special pre-adverse action notice if a criminal record is the reason for the contemplated adverse action. See Alert November 1, 2017. The California Department of Fair Housing and Employment issued updated regulations on employers' use of criminal record. Of particular use was the need for pre-adverse action notice identifying the disqualifying conviction(s). These regulations follow the recent ban the-box laws. See July 5, 2017 Alert.

Salary History

California has now prohibited employers from inquiring about an applicant's past wage/salary history on the theory that this practice keeps female income lower than male income for the same type of jobs. So when doing employment verifications, if the CRA asks about pay and the CRA does collect this information, it cannot forward this information to its customers.

April 2018 Comment on Enforceability

As previously discussed in our alerts, a significant legal issue has developed in the State of California regarding the enforceability of their mini FCRA laws. Once upon a time, §1785 and §1786 of the California Civil Code addressed credit reports and investigative consumer reports respectively. There was a hole in state coverage: the ordinary background screening report was not covered. Then the legislature in 2001 amended §1786 to bring in all reports relating to a consumers' character regardless of how the information was obtained and no longer was it limited to personal interviews. §1785 continued to cover reports about a consumer's credit worthiness. The legal problem is that most pieces of information relate both of these characteristics: character and credit worthiness. The courts in a series of three cases[1] dealing with tenant screening held that the laws in §1785 and §1786 were unconstitutional because it was impossible for the CRA to know which law applied to a report. On March 19, 2013 a federal court held the statutes unconstitutional in the context of an employment background screening report. Roe v. LexisNexis, United States District Court for the Central District of California, Case No. CV-12-6284 GAF (EX). This makes the fourth court decision ruling the statutes are unconstitutional. In Conner vs. First Student Inc., another California appellate court ruled that 1786 was not unconstitutional. The court held that a CRA must simply comply with both laws. The court did not acknowledge that some requirements of 1785 and 1786 are inconsistent. That case has been appealed to the California Supreme Court. As of this April 2018 writing, that case is still pending.

While these decisions are not necessarily binding upon other courts, this does create very strong precedence on this issue, and it is most likely that other courts in California would agree with this position. If the statutes are unconstitutional, as ruled by the courts, then the courts need not address the federal issue of whether the statutes are pre-empted by the FCRA.

At this point it is still wise, as an administrative matter and to avoid litigation expense, to follow the California law as best as you can, but plaintiff's lawyers will be getting the word out that only the FCRA applies in California. This means that the California civil penalty of $10,000 per violation no longer applies. There are lawyers who use this penalty to essentially "greenmail" CRAs into settling claims. One of the most active lawyers in this area was the consumer's lawyer in Roe. This may be the beginning of the end of the reporting nightmare in California.

[1] Moran v. Screening Pros, LLC, U.S. District Court for the Central District of California, Case No. 2:12-cv-05808 SVW-AGR (2012); Ortiz v. Lyon Management Group, Inc., 69 Cal. Rptr.3d 66 (Ct. App. 2007); Trujillo v. First American Registry, Inc., 68 Cal. Rptr.3d 732 (Ct. App. 2007).