

Woska Associates
Employment Law Group

February 2003
Rev. 8/10

Employment Law Forum

Workplace Investigations in California

When conducting background and workplace investigations, and reference checking, employers must be sensitive to the federal Fair Credit Reporting Act (FCRA).¹ In California, the state counterpart to the FCRA is the Investigative Consumer Reporting Agencies Act (ICRA).² The ICRA requires employers who use third parties to conduct certain types of investigations to provide disclosures to the persons (employee or prospective employee) impacted. On September 28, 2002, Governor Davis signed legislation (AB 1068, AB 2868) clarifying the ICRA that became effective immediately.

The ICRA amendments expand the disclosure requirements concerning consumer reports. Since the provisions of the FCRA and ICRA are subject to different interpretations, employers should consult with counsel when background and workplace investigations become an issue.

Following are questions and answers commonly raised by employers concerning the ICRA.

Question: What is an “investigative consumer report?”

Answer: An “investigative consumer report” means a consumer report in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through any means.³ Reference checking and background investigations would be included under the definition.

Question: What is an “investigative consumer reporting agency?”

Answer: An “investigative consumer reporting agency” means any person who, for monetary fees or dues, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or

licensing purposes, or any licensed insurance agent, insurance broker, or solicitor, insurer, or life insurance agent.⁴

Question: What types of actions initiated by the employer are most often impacted by the ICRA?

Answer: When an employer conducts background investigations, reference checking, workplace investigations, or uses the services of an outside agency to provide assistance in conducting an investigation, the provisions of the ICRA are affected.

Question: If an employer receives a sexual harassment complaint and hires a consultant to do the investigation, do the notice and consent provisions of the ICRA require notification to the alleged harasser:

Answer: No. The notice and consent requirements of the legislation do not apply with respect to investigations into misconduct or wrongdoing.⁵ The exemption to the notice and consent provisions applies to any investigation when there is suspicion of wrongdoing or misconduct, whether conducted by an investigative consumer reporting agency (consultant) or in-house staff.⁶

Question: Does an employer have any disclosure requirements under the ICRA when using employees to conduct background investigations and reference checks on prospective hires?

Answer: Yes, although limited. The only time that an employer has a disclosure obligation is when information is obtained that is a matter of public record.⁷ When public records are obtained, the employer must provide the consumer with a copy within seven days.⁸

Question: What is a “public record?”

Answer: Public records are defined as “records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment.”⁹

Question: Does the employer have any disclosure requirements under the ICRA when using a consultant to conduct background investigations and reference checks on prospective hires?

Answer: Yes. If an investigative consumer report is sought for employment purposes other than suspicion of wrongdoing by the subject of the investigation, the person

procuring or causing the report to be made shall, not later than three days after the date on which the report was first requested, notify the consumer in writing.¹⁰

Question: What disclosure and notification requirements are employers required to provide?

Answer: There are several forms that employers should have available.¹¹ These include:

- California Consumer Rights – Describes the rights of consumers when an investigative consumer report is obtained on the consumer.
- Disclosure and Release – Used in connection with an application for employment. Explains the consumer’s (applicant) rights, authorizes any party or agency contacted (reference check and background investigation) to furnish information, and provides the applicant with the right to receive or to waive a copy of any investigative consumer report.
- Cover Letter – Used when providing a copy of report to a consumer.
- Addendum to Contract with Consumer Reporting Agency – Identifies the obligations of the parties with respect to the requirements of the ICRA beyond those of the FCRA.

Employers may elect to place a check box on an application form indicating whether the consumer wishes to receive a copy of the report.

Conclusion

More information is available regarding pre-employment background investigations in an article entitled “Legal Issues for HR Professionals = Reference Checking/Background Investigations” published in the Spring 2007 edition of *Public Personnel Management*. The article may be found under the “Publications” link of this website.

¹ 15 U.S.C. Sec. 1681 *et seq.*

² Cal. Civil Code Section 1786 *et seq.*

³ Cal. Civil Code Section 1786.2 (c).

⁴ Cal. Civil Code Section 1786.2 (d).

⁵ Cal. Civil Code Section 1786.16(a)(2).

⁶ Cal. Civil Code Section 1786.16 (c).

⁷ Cal. Civil Code Section 1786.53 (a).

⁸ Cal. Civil Code Section 1786.53 (b) (1).

⁹ Cal. Civil Code Section 1786.53 (a) (3).

¹⁰ Cal. Civil Code Section 1786.16 (a) (2).

¹¹ Sample forms are available at www.providerssource.com.