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ALERT: New California Law Adds More Disclosure Requirements to Background Checks on Employees and Job Applicants

Under the California Investigative Consumer Reporting Act and the Federal Fair Credit Reporting Act, employers wishing to undertake certain kinds of background checks on their employees or job applicants are required to comply with certain notice and disclosure obligations. Recently, the California legislature mandated additional requirements for employers. Effective January 1, 2002, new amendments to California law require further notice obligations to inform both employees and applicants when the company obtains "investigative reports," including reference checks, and in most-cases limits a companies' ability to maintain the confidentiality of reports even if prepared "in house."

This bulletin will provide a brief discussion of some of the most frequently asked questions about the amendments to California's Investigative Consumer Reporting Act (ICRA).

Q: Is my company covered by ICRA?

A: ICRA covers all companies doing business in California. In addition, the law covers third-party reporting agencies that conduct investigations and background checks. (It is not yet clear, however, whether 3rd party reporting agencies that conduct investigations only occasionally will trigger ICRA's obligations.)

Q: What types of "reports" employers prepare or obtain does ICRA cover?

A: ICRA creates notice and disclosure requirements for "investigative consumer reports." Broader than merely credit checks, investigative consumer reports include any record of an individual's "character, general reputation, personal characteristics or mode of living." Such records can be generated from a variety of sources including 3rd party vendors, the Internet, public records or through interviews with employees and references. The most common types of investigative consumer reports in the employment context typically include reference checks, criminal background checks, and apparently also investigations of employee harassment and misconduct. The Act does not apply to reports limited to specific factual information relating to a consumer's credit record (e.g., credit report). Moreover, it is unclear whether ICRA requires the disclosure of investigative reports attorneys prepare in anticipation of potential litigation.

A full review of the types of "reports" subject to the Act is beyond the scope of this article. The analysis is fact intensive and no California court has yet offered guidance as to the scope of the law. Moreover, there are strong arguments on both sides of the issue. Accordingly, a well-advised employer will consult with counsel to determine whether individual reports generated in the employment context may be covered by the new amendments.

Q: When must an employer give notice to an employee or applicant that it is initiating an investigative report?

A: Once an employer initiates an investigative report about an applicant or employee, it must notify that person in writing within three days. The notice must include:

- The name and address of the organization conducting the investigation;
- The nature and scope of the investigation requested; and
- A summary of the employee's rights to obtain information regarding the report.

California law did not previously require employers to inform employees or applicants they were obtaining investigative reports when they were prepared in-house by company employees. However, the new provisions of the Act require companies to inform applicants and employees they are seeking an investigative consumer report for any employment purpose, including "employment, promotion, reassignment, or retention," even when prepared in-house.

Q: I thought employers did not need to provide notice to an employee or applicant if it initiated the investigative report "in-house."

A: Not any more. Under the "old" California law, employers were entitled to prepare "in house" reports without the need to notify employees. However, amendments to California law now expressly eliminate this exception, and require employers to provide notice to all applicants and employees even when the investigation is conducted in-house by company employees.

Q: Are there special notice requirements for an employer if it has a 3rd party initiate an investigative report?

A: Yes, if the employer is seeking a report from a 3rd party, (e.g., a private investigative company) the company must provide a certification to the investigative company that:

- The employer has provided notice to the employee or applicant, with the necessary disclosures listed above; and
- That the employer will provide a copy of the report to the employee (as described below).

Q: Is an employer required to disclose the investigative report to the employee or applicant?

A: Yes. The new provisions of the Act require employers to provide every applicant or employee with a copy of the "investigative report." The employer is also required to provide the name and contact information for any 3rd party company issuing the report. This information must be provided at the time of the meeting or interview with the employee, or within seven days of the date the employer receives a report, whichever is earlier.

Under the "old" California law, employers could prepare "in house"

reports, rather than go through 3rd party companies, without disclosing the results to the employee or applicant. However, amendments to California law now eliminate this exception. Employers must now provide all applicants and employees with investigative consumer reports generated by company employees. This new requirement applies whether or not the individual requests the report, and also applies regardless of whether adverse action was taken against the individual based on the report. Accordingly, even if an employer decides to hire an applicant, it must provide that individual with a copy of the investigative report.

Q: How much information does an employer need to provide to the employee or applicant?
A: When an employer obtains an investigative consumer report from an outside agency, the employer must provide the employee or applicant an unexpurgated copy of the report as the employer received it. When an employer prepares the investigative consumer report internally, the new amendment also requires the employer provide the "information" the investigation generated to the employee, and not just a report or summary. Although the language of the statute leaves room for argument that employers need only provide information on which the employment decision was based, the safest course is for employers to furnish all investigative information obtained about the employee or applicant. The statute is silent as to whether properly asserted "attorney-client privilege" or "attorney work product" claims trump or must bow to ICRA's disclosure requirements.

Q: Does an employer have to tell an employee it is investigating a claim of harassment or misconduct?
A: No. New amendments to the statute make clear that the Act's notice requirements do not apply to reports where an investigation is sought "based upon the suspicion of wrongdoing by the subject of the investigation." Thus, employers do not have to give notice to employees reasonably suspected of harassment that they are subjects of an investigation. Similarly, employers do not need to provide notice to employees when the employer has a "good faith belief that the employee is engaged in any criminal activity likely to result in a loss to the employer." For example, an employer may obtain an investigative report about an employee suspected of stealing from the company without notifying the employee it is conducting such an investigation.

Once the employer obtains the report, however, it must provide a copy of the report to the employee, along with the name and contact information for any 3rd party which issued the report. This information must be provided at the time of the meeting or interview with the employee, or within seven days of the date the employer receives or completes such a report, whichever is earlier.

Q: May an employer ask an outside company to provide notice to the employee and send whatever report is generated?
A: Probably not. Arguably the most burdensome requirement of the amendment is that the Act now appears to require that the employer provide notice and disclosure of the investigative report to the employee or applicant. Although the specific language of the statute leaves room for argument that employers may delegate this responsibility to 3rd parties, the safest course is for employers to furnish both notice and the actual report to employees and applicants themselves.

Q: What are the penalties for failing to follow the requirements of ICRA?
A: Employers that violate ICRA are subject to substantial penalties and potential civil liability. Under the amended statute, penalties for noncompliance are attorneys' fees and the greater of $10,000 or actual damages. Accordingly, employers should be particularly mindful of the risk of class-actions brought on behalf of applicants at $10,000 per person. Additionally, if the employee or applicant can show that the employer was grossly negligent or willful, he or she may be entitled to recover punitive damages. Finally, ICRA preserves an employee or applicant's right to maintain a civil action against an employer for invasion of privacy, defamation or breach of public policy.

Q: What are the specific steps an employer must take to comply with both the Federal Fair Credit Reporting Act and California's ICRA?
Notify the employee or applicant in writing that the company may obtain an investigative consumer report. This notification must be in writing, must be clear and conspicuous, must be in a wholly separate document (i.e., not on the application), and must be given to the applicant or employee before the employer orders the report. (Federal Requirement)

Secure written authorization from the applicant or employee before obtaining a consumer report or investigative consumer report. (Federal Requirement)

If the employer decides to obtain an investigative consumer report, notify the applicant or employee in writing that such a report will be made. This notification must be given within three days of ordering the report.

If the employer uses an outside company to obtain an investigative consumer report, it must certify that it has provided the appropriate notice to the employee or applicant, and that it will provide the individual with a copy of the report.

Once a final report is generated, provide the employee or applicant a copy of the report and the information about the name of any 3rd party that issued the report and its contact information. The report must be provided at the time of the meeting or interview, or within seven days of the date the report is finalized, whichever is earlier.

The changes to ICRA present an enormous source of uncertainty with many unanswered questions, including whether all currently "routine" employment investigations, human resources personnel and/or outside counsel undertake, must be disclosed to applicants and

employees. We expect, consequently, a significant amount of litigation over its breadth and application. In light of these significant changes to the law, companies may want to consider carefully the scope of the investigative report it is ordering. For example, companies may decide to ask a 3rd party conducting criminal background investigations to simply provide a brief summary indicating that an applicant is "eligible" or "ineligible" for employment, rather than the actual results of the investigation. Nevertheless, until a California court offers some guidance as to the scope and impact of the new amendments, a well-advised employer will consult with counsel to ensure that it does not inadvertently run afoul of ICRA's new notice and disclosure obligation.