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Weekly Employment Brief

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New Laws Make Employment Background Checks Easier

Two new bills, just signed by Governor Davis, reduce employer obligations under the Investigative Consumer Reporting Act (ICRA) that previously imposed onerous notice and disclosure obligations. AB 1068 and AB 2868 significantly reduce employer obligations with respect to background checks, and become effective immediately. Except as mentioned below, "in-house" background checks and investigation activity conducted by the employer are no longer covered by the notice and disclosure obligations. For instance, employers need not disclose the results of reference checks to the applicant/employee. However, if the employer obtains information from matters of public record (i.e., criminal or civil court records, or tax lien information), then in the event of an adverse action (e.g., refusal to hire or termination of employment), the employer must provide a copy of the public record to the applicant/employee.

In addition, under prior law, where the employer uses an investigation service, the employer had to furnish a copy of the background report regardless of whether it was requested by an applicant/employee. Now, consistent with federal law, the employer can ask the applicant/employee to simply check a box to request a copy. If not requested, the employer is not obligated to provide a copy.

Finally, an employer is authorized to answer a prospective employer's inquiry into an applicant's job performance or qualifications, and whether or not the employer would rehire a current or former employee, so long as the information is based upon credible evidence, and the disclosure is made without malice. In light of these new changes, employers should carefully review and appropriately revise any existing policies on background checks and investigative reports.

Ninth Circuit Rules that "Adverse Employment Action" Requires An Objective Showing

The Ninth Circuit Court of Appeals ruled that a Title VII race discrimination claim must be based upon objective evidence of an adverse employment action and not a plaintiff's purely subjective belief that s/he suffered adverse treatment. The plaintiff in *Vasquez v. County of Los Angeles* worked in a detention facility for youth and was assigned to a unit with another more senior officer who plaintiff claimed made racial remarks. Plaintiff sued after he was warned about a rule infraction and transferred to a field position. Other officers of his rank held such field positions, and the job carried the same pay, hours, amount of responsibility and authority as the non-field job. Plaintiff asserted that the field position had more administrative duties and less interaction with youth. The court determined that in order to state a claim, plaintiff must show objective evidence of an adverse employment action and not just his or her subjective belief about adverse treatment. Otherwise, an employee could sue over every employment action s/he did not like. Because he suffered no decrease in pay, hour, work location, authority, or responsibility, plaintiff did not state a valid claim. While this is a favorable decision, employers should always carefully document the business reasons for job reassignments.

Governor Vetoes Retaliation Law and Bill Restricting Use of Mandatory Arbitration

In a favorable action for employers, Governor Davis just vetoed a billed, passed by the California Legislature, that sought to limit retaliation against employees by creating a rebuttable presumption that the law was violated if an employee is fired or demoted within 90 days of exercising his or her rights under the Labor Code (i.e., "whistle blowing"). In his veto message, the Governor wrote: "This bill would only aggravate a practice by some employees, who, upon learning they are being investigated for misconduct, report groundless allegations of misconduct by their supervisors or co-workers. The purpose of fabricating a prophylactic retaliation claim is to forestall the employer from bringing an adverse action. This practice by disgruntled employees will have a chilling effect on a supervisors' willingness to legitimately discipline problem employees."

In another favorable development for employers, Governor Davis vetoed a bill, SB 1538, that would have prohibited employers from requiring mandatory arbitration agreements as a condition of employment. In his veto message, the Governor wrote: "In these difficult economic times I am not prepared to place additional burdens on employers by preventing them from requiring alternative dispute resolution of employment claims." While this is a positive development, employers must still be sure to meet the "fairness" requirements for a proper arbitration process.