

AB655: The 2002 Earthquake that Hit California Employers ... And May Soon Visit Your State!

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Most employers in California have heard about AB655, a bill authored by Assemblyman Wright intended to stop identity theft. Unfortunately, the Assemblyman's good intentions went too far and the bill imposed new obligations that create havoc for California employers. Due to its title, the bill was never noticed by the California Chamber of Commerce or any legal update document service serving the legal community. The bill flew through the legislature without opposition.

There are now three bills in the legislature to amend AB655. They are AB 1068, AB 2161 and AB 2868. The bills go beyond AB655 to address issues that for years have plagued the California Consumers Investigative Reporting Agencies Act, found in Civil Code Section §1786. This article addresses only the most serious issues in AB655.

Assembly Bill 1068

The most compelling issue of AB655, is that it obligates employers to provide copies of information obtained through **The Screening Group** be given to the subject of the investigation, whether the employer outsourced the background check to a consumer reporting agency (CRA) – any third party who charges fees to provide an investigative consumer report – or the employer performed the background or reference check itself. As written, “any individual who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on an individual's character, general reputation, personal characteristics, or mode of living for employment purposes” must give a copy of the report within seven days or at an interview with the consumer if earlier.

Too much trouble you say? Consider the alternative: those who violate any provision of AB655 are subject to actual damages or \$10,000, whichever is greater per incident! Attorney's fees plus punitive damages are also available.

AB1068 will amend the requirement of sending copies of reports. If a CRA is used, the disclosure form would contain a box for the consumer to check if they want a copy of their report and either the CRA or employer would have to furnish it. When a CRA is not used, and the employer accesses public records, their employment application must contain a box that the consumer can check to obtain a copy. If the employer does its own background checks, but does not access public records (i.e. only performs references), they do not have to provide report copies.

Realizing that the FCRA requires employers to follow “adverse action” procedures, AB1068 adds back adverse action requirements. These requirements are not changed from previous California law, however AB1068 requires adverse action procedures to be followed whether an employer is taking adverse action due to a report from a consumer reporting agency or due to a background check that the employer conducted itself where it accessed public records.

Other Issues

AB655 added clear definitions to §1786 for the first time. California's definitions essentially mirror those found in the Fair Credit Reporting Act. However, the law makes some separate distinctions. California defines “person” to include not only an individual, but also any business entity, trust, estate, association, government or governmental agency. “Consumer” is defined as “a natural” individual who has made application to a “person” for employment, insurance, or the hiring of a dwelling unit. An “investigative consumer report” means a consumer report, other than a credit report, for which information on a “consumer's” character, general reputation, personal characteristics, or mode of living is obtained through any means. Under the FCRA, this term is defined differently; a “consumer report” includes any report (including “credit”), while an “investigative consumer report” is a consumer report derived from personal interviews.

Unlike previous law, AB655 requires employers to disclose to the consumer that they “may” request an investigative consumer report from a CRA at any time prior to requesting the report but not later than three (3) days of request. Under §1786.16, any “person” could not procure or cause to be prepared an investigative consumer report unless there was proper disclosure. For employment however, AB655 adds

“other than for suspicion of wrongdoing by the subject of the investigation” to its disclosure requirements. By adding these words, AB655 removes the requirement to disclose to an employee prior to an investigation that background search will be performed. AB1068 will amend AB655 by adding “misconduct” to the disclosure exception: “other than for suspicion of wrongdoing or misconduct by the subject of the investigation.”

What is the Federal Trade Commission’s take on California’s new disclosure rule? First, it is clear that the FCRA requires that a complete disclosure and authorization be obtained prior to requesting any background check, even for wrongdoing. The FTC published two previous letter opinions regarding sexual harassment investigations emphasizing the requirement for disclosure. Further Section 624 of the FCRA generally prohibits states from enacting laws which conflict with the FCRA until 2004.

What should a California employer do if they need to perform an investigation for wrongdoing? The best advice is to rely on your employment attorney and make sure the attorney’s liability insurance coverage is paid as consumers can still sue under the FCRA if they were not notified or did not personally authorize the background check.

Many companies who use a CRA have seen a paragraph of newly required language in 16-point type on their reports. AB1068 will reduce the required language to only the first statement and will require it in 12-point bold font. AB1068 will also require that the CRA’s name, phone number, and address appear on disclosure forms.

Assembly Bill 2161

Language regarding the reporting of information was virtually unaltered by AB655 except it removed the \$75,000 income bar where convictions for those who earned \$75,000 or more could be reported beyond California’s general seven-year rule. AB2161 by Assemblyman Maddox seeks to amend the reporting language in §1786.16 by allowing CRA’s the ability to report convictions with no time limitation, thus conforming to federal law. A tough battle to get the bill through the judiciary committee was fought in May and the measure passed with the promise of an amendment to leave the seven-year limitation for misdemeanors, but remove it for felonies. The bill passed the Assembly and will soon be heard by the Senate.

In Summary

What should employers do while waiting for these bills to pass? First, employers should be aware that although Assemblyman Wright asked in his first draft that AB1068 and AB2868 be retroactive to January 1, 2002, legislative counsel turned him down. Therefore, employers will be liable if they don’t conform with AB655 until the legislation changing it is passed. A new amendment to the penalty sections to reduce employer liability from \$10,000 per incident is still on the table and may be added, but the law requires that employers continue to send reports, including references, to consumers until the bills are passed! The most optimistic date for passage of these bills is late summer. In the meantime, failure to comply with AB655 could bring serious financial consequences.