

SWERDLOW FLORENCE
SANCHEZ & RATHBUN
a law corporation

9401 Wilshire Blvd., Suite 828, Beverly Hills, CA 90212 • (310)201-4700 • Facsimile:(310)273-8680

***CALIFORNIA'S INVESTIGATIVE CONSUMER REPORTING
AGENCY ACT IMPOSES NEW HURDLES ON EMPLOYERS WHO
CONDUCT BACKGROUND CHECKS.***

TO: Clients and Friends of The Firm
DATE: March 26, 2002

On January 1, 2002, California Assembly Bill No. 655, which amends California's Investigative Consumer Reporting Agencies Act ("ICRAA"), became effective. As a result of this new amendment, the ICRAA now places additional, substantial notice and disclosure obligations on California employers who obtain investigative consumer reports on current and prospective employees – even if only obtaining routine, "background" employment-verification information.

In general, under California law an "investigative consumer report" is defined broadly as a report on a consumer's general reputation, personal characteristics, or mode of living, obtained through any means. Basic employment verification and routine reference checks appear to fall within this category as nothing in the definition of "investigative consumer report" or elsewhere in the statute purports to remove such reports from the statute's reach.¹

¹ Investigative consumer reports do not include "a consumer report or other compilation of information that is limited to specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor of the consumer or from a credit reporting agency when that information was obtained directly from a potential or existing creditor of the consumer or from the consumer." Under California law, a "consumer credit report" is any communication bearing on a consumer's credit worthiness, credit standing or credit capacity, and does not include information solely on a consumer's character, general reputation, personal characteristics or mode of living obtained through personal interviews. Although such reports are sometimes used by employers in making employment-related decisions, the amendments to California's Consumer Credit Reporting Agency Act, unlike the amendments to the ICRAA, do not directly affect the obligations of employers.

March 26, 2002

Page 2

The new amendments were enacted for the specific purpose of increasing consumer protection against identity theft by, in part, allowing consumers access to their reports so that they could correct any misinformation the reports might contain. As discussed below, however, the amended statute appears to impose the new obligations in an overly broad manner to all investigative consumer reports (including reports that are based on information provided directly by the consumer), thereby going beyond what would seem necessary to accomplish the amendments' stated objective.

Employers Must Provide Current Employees Notice Of Investigations

Subject to a sole exception, the ICRAA has been expanded to require employers to provide notice to the applicant or employee of any investigation conducted for “employment purposes,” which is defined broadly to include “evaluating a consumer for employment, promotion, reassignment, or retention as an employee.” Previously, employers who conducted investigations for the purpose of evaluating current employees for “promotion or reassignment” did not have to comply with these requirements.

In addition to expanding the class of who must be notified, the amendments also impose additional requirements about the content of the notice. As in the past, the employer must notify the applicant or employee that an investigative consumer report regarding his or her “character, general reputation, personal characteristics, and mode of living” will be made. In addition, this notification must now also include the name and address of the investigative consumer reporting agency conducting the investigation, the nature and scope of the investigation requested, and a summary of the individual’s statutory rights to inspect all files maintained by the investigative consumer reporting agency regarding that individual. Such notice must be in writing and mailed, or otherwise delivered to the individual, not later than three days after the employer first requests the report.

March 26, 2002

Page 3

Of some solace to employers, the current law does carve out a new exemption from the notice requirements for reports obtained on individuals whom employers are investigating for “suspicion of wrongdoing.” Even prior to the amendments, employers were not required to give notice when procuring reports for the purpose of determining whether to retain an employee whom they had a good faith belief was engaged in criminal activity likely to result in a loss to them. The new “suspicion of wrongdoing” language appears to encompass a broader range of suspected wrongful behavior, such as harassment and discrimination, not necessarily covered by the criminal-activity exemption.

Employers Must Provide Individuals With Copies Of The Investigative Reports

Perhaps the most significant change in the statute is the new requirement that employers furnish copies of the investigative consumer report to all applicants and employees whom they investigate, regardless of whether the individuals request the report or whether the investigation leads to an adverse employment action against the individual. An employer must provide the report, along with information on who issued the report and how to contact them (as described above), either at the time of the meeting or interview between the subject of the investigation or within seven days of the date the employer receives the report, whichever is earlier.

Notably, the statute expressly requires that the report be provided by the person “who requests an investigative consumer report” (i.e., for purposes of this newsletter, the employer). The amended statute does not, however, address whether the employer can delegate this duty to the investigative consumer reporting agency or whether the employer itself must provide the report to the applicant or employee.

March 26, 2002

Page 4

Employers Must Disclose Information Obtained Through In-House Investigations

Also of particular concern, employers who conduct their own employment investigations, in lieu of using the services of an investigative consumer reporting agency, are now required to comply with new disclosure obligations under an entirely new section of the ICRAA. Employers must provide the information they obtain in-house regarding the applicant's or employee's general reputation, personal characteristics, or mode of living to the individual at the time of the meeting or interview with the individual, or within seven days of the date the person obtains the information regarding the individual, whichever is earlier.

The statute speaks generally of providing "that information" which is compiled, and does not clarify and, therefore, seems less concerned with, the form in which this information must be disclosed. Thus, employers must provide an applicant or employee with whatever information they obtain through their own investigations, but retain discretion as to the form of such disclosure. Fortunately, this new statutory section stands alone and, thus, is not subject to the additional advance notice requirements or more specific disclosure requirements that apply to investigative reports that are obtained through third-party reporting agencies, discussed above.

Penalties

Penalties for violations of the ICRAA have been increased significantly to actual damages or ten thousand dollars (\$10,000), whichever is greater. Additionally, plaintiffs are entitled to attorneys' fees and may even seek punitive damages for grossly negligent or willful violations of the statute.

March 26, 2002

Page 5

Employers Must Continue To Comply With The Federal Fair Credit Reporting Act

Employers must continue to abide by the Fair Credit Reporting Act, the ICRAA's federal counterpart. To the extent California's statute provides greater protection for consumers without being inconsistent with federal law, however, California employers must follow California law.

California Employers Hoping For Acceptable Clean-Up Legislation

Two bills are currently pending in the California Legislature that are related to AB 655. Neither of these bills, however, address the revisions to ICRAA that are described in this E-Alert and that are of most concern to employers. Moreover, given the significant impact this new legislation has on employers, we anticipate that there will be a vigorous lobbying effort to revise this bill, most likely with strong opposition by organized labor. Thus, while we are hopeful that a clean-up bill (of some sort) ultimately will be passed, until one is signed by the Governor, employers are obligated to comply with the ICRAA as currently enacted. Given the increased penalties for non-compliance, we suggest employers adopt a conservative interpretation of the statute, as provided above, wherever the obligation to comply is not crystal clear.

We encourage you to call your SFSR attorney at (310) 201-4700 to discuss the ICRAA, AB 655, and the impact of this legislation on your Company's operations.

###