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Effective January 1, 2012, a new law in California has changed the requirements for the background check disclosure that employers must provide in order to conduct background investigations in California. Employers based outside of California may be governed by this requirement if they obtain background investigations on California candidates.

The new law, Senate Bill 909 (SB 909), amended the California Investigative Consumer Reporting Agencies Act (ICRAA), which regulates background checks in California, other than those involving credit reports. The amendments, which are codified in California Civil Code Sections 1786.16 and 1786.20, require additional disclosures by investigative consumer reporting agencies, as well as by employers who procure investigative consumer reports on job applicants or employees.

Although the amendments affecting the consumer reporting agencies went into effect on January 1, 2011, the bill gave an additional year for employers and consumer reporting agencies to come into compliance. These new requirements have not been widely publicized, and employers should become familiar with them.

New requirements for employers

Under the ICRAA, any person who procures an investigative consumer report for employment purposes must provide a written disclosure, in a separate document, to the consumer (a job applicant or employee) before the report is obtained. The written disclosure must state:

- the fact that a report may be obtained,
- the permissible purpose of the report,
- the fact that the disclosure may include information on the consumer's character, general reputation, personal characteristics, and mode of living, and
- the name, address, and telephone number of the investigative consumer reporting agency.

Effective January 1, 2012, this disclosure **must also include the web address** where the consumer "may find information about the investigative consumer reporting **agency's privacy practices**, including whether the consumer's **personal information will be sent outside the United States** or its territories." If the investigative consumer reporting agency does not have a web site, then the employer must provide the consumer with a telephone number where the consumer can obtain the same information.

New requirements for consumer reporting agencies

Under SB 909, investigative consumer reporting agencies have additional disclosure requirements for California investigations. The amendments also establish liability for the agency in the event of a security breach.

First, any investigative consumer reporting agency operating in California must "conspicuously post" information on its primary internet website describing its privacy practices relating to its preparation and processing of investigative consumer reports. If the agency does not have a website, it must mail a written statement of its privacy practices to consumers upon request.

The privacy statement "shall conspicuously include" at least the following information:

- A statement entitled "Personal Information Disclosure: United States or Overseas" that indicates whether the personal information will be transferred to "third parties" outside the United States or its territories. Even if an agency transfers information internationally within its own business entity only, it is transferring to a "third party," as the term "third party" is defined to include "a contractor, foreign affiliate, wholly owned entity, or an employee of the investigative consumer reporting agency."

- A separate section that provides contact information for the agency's representatives who can assist a consumer with additional information regarding the agency's privacy practices, or policies in the event of a compromise of the consumer's personal information.

Finally, the law now provides a private cause of action allowing a consumer to recover actual damages, plus attorneys' fees and costs, if that consumer "is harmed by any unauthorized access of the consumer's personally identifiable information, act, or omission that occurs outside the United States or its territories as a result of the investigative consumer reporting agency's negligently preparing or processing an investigative consumer report, or portion thereof, outside of the United States or its territories."

Practical implications

In light of the new requirements under SB 909, employers should **check the form** being used to disclose a background check to a job applicant or employee. This form should be updated to include the web address of the consumer reporting agency or, if the agency does not have a website, a telephone number where a consumer can reach an agency representative to find information about the agency's privacy practices. Additionally, the employer should check with its investigative consumer reporting agency to ensure that the agency's website includes proper disclosure about overseas transfer of personally identified information. If the agency does not have a website, the employer should check whether the agency has a representative available to answer consumer inquiries on the topic.

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