

California High Court Confirms Written Authorization Required For Most Employer Background Checks

by Gabrielle Wirth, Pavlina Kochankovska Rafter, and Nisha Verma

The California Supreme Court recently confirmed that employers seeking background reports need to ensure they are in compliance with both the Investigative Consumer Reporting Agencies Act (ICRAA) and the Consumer Credit Reporting Agencies Act (CCRAA) – compliance with only one of the two statutes will be insufficient and could result in liability.

In California, two statutes govern the steps employers must take before ordering a background report on a prospective or current employee – the Investigative Consumer Reporting Agencies Act (ICRAA), and the Consumer Credit Reporting Agencies Act (CCRAA). The ICRAA governs background reports bearing on “character, general reputation, personal characteristics, or mode of living [which are] obtained through *any* means,” including personal interviews. The CCRAA, on the other hand, governs reports bearing on “credit worthiness, credit standing, or credit capacity,” but then expressly excludes character information obtained through a personal interview. These are sister statutes to the federal Fair Credit Reporting Act (FCRA), which imposes similar, but not identical, requirements.

In *Connor*, the employer obtained reports without obtaining a written authorization from its employees, who worked as bus drivers. When faced with a class action lawsuit under the ICRAA, it argued that it should not be held liable because the ICRAA overlapped with the CCRAA (which does not require written authorization), making the former unconstitutionally vague, and therefore unenforceable. Interestingly, it was never clear in *Connor* that the CCRAA even applied, as the background reports never sought or included credit information, and additionally, the Labor Code restricts the use of credit reports by employers outside of limited exceptions, which would not cover bus drivers

The Court rejected the employer’s argument, finding that “employers can comply with both statutes without undermining the purpose of either,” and explained that what is required is careful consideration and forethought. That is, if an employer seeks a report that might implicate both statutes it is “expected to know and follow the requirements of

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both statutes, even if that requires greater formality in obtaining a consumer's credit records (e.g., seeking a subject's written authorization to conduct a credit check if it appears possible that the information ultimately received may be covered by ICRAA)."

Note that in *Connor*, the plaintiff filed the class action against both the employer and the company who prepared the background reports, as both can be held liable. Employers should confirm with any background check agencies they work with that their practices relating to background reports are in compliance with both the ICRAA and CCRAA.

The members of Dorsey's Labor and Employment group are available if you have any questions regarding employer background checks.