

Assembly Bills 1068 and 2868

On September 28, 2002 and effective immediately, California enacted two bills, AB 1068 and AB 2868, that revise and clarify some of the provisions under AB 655, which was a bill that became effective in January of 2002. Below is a summary of some of the significant revisions under AB 1068 and AB 2868 regarding the use of "Investigative Consumer Reports" ("Reports").

If you would like to see the full text of the bills, please visit www.leginfo.ca.gov/bilinfo.html and enter a search for AB1068 and AB 2868. Please remember that in addition to complying with California laws, you must also comply with the *Fair Credit Reporting Act* (FCRA).

Significant Revisions

For Reports Ordered Through HIRE-SAFE (A Consumer Reporting Agency):

When you order a Report from a Consumer Reporting Agency such as HIRE-SAFE, you no longer have to automatically provide a copy of the Report to the Consumer as was required under AB 655. Instead, you are required to provide a check box that allows the Consumer to exercise his or her right to receive a copy of the Report. If the box is checked, you must provide a copy of the Report to the Consumer within three (3) business days of your receipt of the Report. Furthermore, you may contract with a company, such as HIRE-SAFE, to provide a copy of the Report to the Consumer. (1786.16)

Please Note: If the Consumer does not check the box, you are not required to provide a copy of the report. Please remember that these California laws do not change your obligations under the FCRA and if you decide to make an adverse decision based on information, in whole or in part, from the Report, you must still follow through with the pre-adverse action procedures before making the adverse action, and provide a copy of the Report.

For Reports NOT Obtained from a Consumer Reporting Agency:

If you do not use a Consumer Reporting Agency, such as HIRE-SAFE, to obtain public record information on an individual 2, you must automatically provide a copy of the related public record to the consumer within seven (7) days after receipt of the information, regardless of whether the information is received in written or oral form. A check box can be used to allow the consumer to waive his or her rights to receive a copy of this public record. (1786.53) Therefore, if this box is checked, you do not have to provide a copy of the public record information.

The above two requirements do not apply when conducting an investigation due to suspicion of wrongdoing or misconduct by an employee. (1786.16(c) 1786.53(b)(3))

The California disclosure requirements have also been slightly revised. Instead of having to provide the disclosure no later than three days after the date the Report was first requested, it now reads that it has to be made before the report is procured or caused to be procured.

The requirements for the California disclosure are very similar to the requirements of the FCRA disclosure, such as it must be clear and conspicuous, in writing, and in a document consisting solely of the disclosure. However, among some of the differences, California requires you to disclose the following: (a) The investigative consumer reporting agency's name, address and telephone number; (b) The nature and scope of the investigation, including a summary of the provisions regarding the time and manner of supplying the information to the Consumer (i.e. a California Summary of Rights) (1786.16). Because the California disclosure contains more information than the FCRA disclosure, it is recommended that both the FCRA disclosure and California disclosure be used in order to satisfy the "solely" requirement of the FCRA. Click to review an FTC opinion letter regarding the "solely" requirement of the FCRA.

Therefore, we suggest that the following documents be used for each applicant: an FCRA disclosure, a California disclosure, an authorization for California and FCRA, and a California Summary of Rights. As the employer or user of consumer reports, it is your responsibility to ensure compliance with all of the relevant federal, state and local laws governing this area. Please consult with your attorney prior to using these samples.

The first page of the Report must contain the following statement in 12 point boldface type:

"The report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from the public records, and information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of the Report."

The minimum period to retain all your documents, such as the disclosure, authorization and the Report, is two (2) years after the report is provided. (1786.11)

Similar to the FCRA, California does not allow certain outdated information to appear on the Report. The new California law now creates an exception to this prohibition whenever an employer is explicitly required by a governmental regulatory agency to check for such outdated information to review a consumer's qualification for employment. (1786.18)

AB 2868 further clarifies the provisions concerning the privileged character of communications regarding job performance and qualifications to authorize a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. (Civil Code 47(c))

1. Please remember that “Investigative Consumer Reports” as defined by California will include all Reports that are ordered from HIRE-SAFE except credit reports which are defined in California as Consumer Credit Reports. This is different from the FCRA where all reports from HIRE-SAFE are considered Consumer Reports with a few of these consumer reports considered as “Investigative Consumer Reports.” Under the FCRA, an Investigative Consumer Report is defined as any consumer report that is obtained through personal interviews that involve more than the mere verification of facts. California treats Investigative Consumer Reports and Consumer Credit Reports separately under 2 different acts; Credit Reports are governed by Cal. *Civil Code 1785* while Investigative Consumer Reports are governed by Cal. *Civil Code 1786*.

2. This public record information applies to any information on a consumer’s character, general reputation, personal characteristics, or mode of living, for employment purposes, that any person may collect, assemble, or communicate.

3. With a few exceptions, usually any adverse information older than seven (7) years, (for bankruptcies the date is ten (10) years), cannot be reported. Section *1786.18(a)(7)* states that an investigative consumer reporting agency cannot make or furnish any report containing records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven (7) years. These items of information shall no longer be reported if at any time it is learned that , in the case of conviction, a full pardon has been granted or, in the case of an arrest, indictment, information, or misdemeanor complaint, a conviction did not result; except that records of arrest, indictment, information or misdemeanor complaints may be reported pending pronouncement of judgment on the particular subject matter of those records, when applicant is applying for work in certain fields such as work at a health care facility with access to patients, drugs or medication; or when required by governmental regulatory agency.