

The Story Behind the News:

ABC News Reports Dozens of Lawsuits over Inaccurate Criminal Reports Stemming from Database Searches

According to a story from ABC News on October 13, 2008, there have been dozens of lawsuits in the past two years alleging that background checks have cost people jobs because they were inaccurately identified as criminals when in fact they were not. The story focused on the use of massive criminal databases, where private firms have aggregated millions of records that are not always accurate. See: <http://abcnews.go.com/TheLaw/story?id=6017227&page=1>

The inaccuracies come in two varieties:

1. The criterion used in the database is “name match only” and reports a criminal record that in fact belongs to someone else. That is because such database searches may not always contain identification data, such as date of birth.
2. The database contains criminal records that are outdated and should not be considered by employers, because something occurred after the data was obtained which makes the record non-reportable, such as a deferred adjudication, expungement, a judge’s order that records be sealed or some sort of judicial “set aside” under state law.

Here is why these errors occur; Under the federal law that regulates pre-employment screening, the **Fair Credit Reporting Act (FCRA)**, a screening firm has two options when it comes to the use of these private databases. Under **Section 613 of the FCRA**, a screening firm can either re-verify the criminal database records at the courthouse to ensure it is current and up-to-date OR send a contemporaneous notice to the applicant advising them that a criminal record is being reported about them.

The problem arises in situations where a screening firm chooses to utilize the “notice” option and does not go to the courthouse to ensure the record applies to the applicant and is proper to report. Although that is a legal practice under the FCRA, it is also a reason that some background reports contain information that does not relate to the applicant or should not have been reported, sometimes referred to as a “false positive.”

It should be noted that this is NOT an issue in California, since that is the one state that specifically requires a screening firm to ensure that public records are current and up-to-date. California law does not permit a screening firm to simply report what is in a database and send a notice to the applicant.

It is also critical to note that such databases can also contain “false negatives,” which means that person with a criminal record is falsely identified as being clear. This can happen because these private databases are a crazy quilt patchwork of data from a number of sources, with wide variations in accuracy, completeness and timeliness. Also, a number of jurisdictions do not report any data at all to these databases. For example, such a database is of little use in some large states like California or New York where little data is reported or identifiers are not provided. Although such databases can be valuable because they contains millions of records, they are best used as a pointer or lead generator for places to look for records, and should not replace court searches of counties where a person has lived or worked unless the database contains the same information that is available at the courthouse.

In response to these concerns, a number of screening firms, including ESR, have adopted standards that would prevent inaccurate criminal records from databases. This is also part of the Concerned CRA standards at: <http://www.concernedcras.com/>.

California has additional requirements governed by the Investigative Consumer Reporting Agencies Act, Civil Code Sections 1786 -1786.60 http://www.oispp.ca.gov/consumer_privacy/laws/code/icraa.asp

In specific reference to the above ABC News report particular attention needs to be paid to the following:

Civil Code: 1786.28.

(a) Each investigative consumer reporting agency that collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates items of information concerning consumers which are matters of public record shall specify in any report containing public record information the source from which this information was obtained, including the particular court, if applicable, and the ate that this information was initially reported or publicized.

(b) A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles, collects, assembles, evaluates, reports, transmits, transfers, or communicates items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall in addition maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.