



WORLDWIDE INVESTIGATIVE EXCELLENCE SINCE 1953

LEGAL RESTRICTIONS ON REPORTING BACKGROUND INFORMATION

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I. Introduction

As a regulated credit reporting agency and professional investigative firm, our goal is to provide our clients with timely and accurate information in conformity with all applicable federal and state laws. There are a myriad of these laws that specifically regulate the information that can be contained in an investigative report.

These restrictions fall into several categories, including: outright prohibitions on reporting a specific item of information; conditional prohibitions where information cannot be reported unless the individual is expected to earn a certain level of income; and prohibitions which restrict the reporting of information after a certain period of time. Where these restrictions apply, we are required to provide a clear report on an applicant even if we find derogatory information.

This can be problematic when we are asked to perform a background investigation on an individual who is a current employee and is being considered for promotion or who is reapplying to a client firm. The client may possess an old report supplied by RAI or another vendor which contains reference to a record that can no longer be reported. This raises questions as to why RAI did not report the item of information. Similarly, an applicant may disclose an arrest or conviction record on the job application or during an interview which is not reported in the background report.

This article will discuss the various regulations at the state and federal level and how those regulations restrict the information that can be contained in a background investigative report.

II. FAIR CREDIT REPORTING ACT RESTRICTIONS

The FCRA lists several categories of information that cannot be included in a background investigative report unless the individual is reasonably expected to earn more than \$75,000 annually:

- (1) Bankruptcy cases that, from the date of entry of the order for relief or the date of adjudication, antedate the report by more than 10 years;
- (2) Civil suits, civil judgments, and records of arrest that from date of entry, antedate the report by more than seven years;
- (3) Paid tax liens which, from date of payment, antedate the report by more than seven years;
- (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years; and
- (5) Any other adverse item of information, other than records of convictions of crimes, which antedates the report by more than seven years.

The FCRA was amended on December 4, 2003 to allow the reporting of conviction information without limitation as reflected in paragraphs 2 and 5 above. However, arrest records may not be reported beyond seven years unless the arrest resulted in a conviction or unless the individual is expected to earn in excess of \$75,000 annually.

III. RESTRICTIONS ON REPORTING ARRESTS.

As noted in the previous section, the FCRA prohibits the reporting of arrest records older than seven years unless the arrest resulted in a conviction or unless the individual is reasonably expected to earn in excess of \$75,000. However, several state laws contain more restrictive prohibitions regarding the reporting of arrest records where no conviction resulted.

The following states prohibit the reporting of arrest records unless the case is pending or a conviction resulted from the arrest: California, Hawaii, Illinois, Kentucky, Massachusetts, New Mexico, New York, Pennsylvania, Rhode Island, Utah and Wisconsin. Thus, in these states, where a case is dismissed against a defendant or the person is found not guilty, we cannot report the case.

Similar to the FCRA, some states prohibit the reporting of arrest records unless there has been a conviction or unless the individual is expected to earn a certain threshold minimum annual income, including: Kansas (\$20,000 annual salary), Maryland (\$20,000 annual salary), New Hampshire (\$20,000 annual salary) and Washington (\$20,000 annual salary). Other states prohibit the reporting of arrest records which are older than seven years regardless of the income level. These states are Montana and Nevada.

An issue that commonly arises is where an individual has successfully completed a diversion program or received a deferred adjudication subject to the successful completion of the terms of probation. For example, we often find cases where an individual has entered a guilty plea but adjudication of the plea is deferred pending the successful completion of a diversion or probation program. If the individual successfully completes the program, the case is dismissed without a conviction or final finding of guilt. Thus, even though the individual has disclosed that they have pled guilty to a crime on the job application, since there was no conviction, the end result is an arrest without a conviction and the case cannot be legally reported.

Georgia has a similar law prohibiting reporting of arrests where the individual has been released under the Georgia first offender law. Michigan prohibits the reporting of misdemeanor records unless the case is pending or unless there has been a conviction.

IV. STATE RESTRICTIONS ON REPORTING CONVICTIONS

Following the 2003 amendments, the FCRA allowed the reporting of conviction information without regard to the length of time that has elapsed since the conviction

However, California, Montana and Nevada prohibit the reporting of convictions where the date of the conviction, release from parole or completion of probation precedes the report by more than seven years. California also prohibits the reporting of misdemeanor convictions where probation has been completed and misdemeanor marijuana possession convictions which are more than two years old.

Hawaii prohibits the reporting of conviction information where the date of the conviction, release from parole or completion of probation precedes the report by more than ten years.

Some states prohibit the reporting of convictions records where the date of the conviction, release from parole or completion of probation precedes the report by more than seven years unless the individual is expected to earn over a threshold annual salary, including: Kansas (\$20,000 annual salary), Maryland (\$20,000 annual salary), Massachusetts (\$20,000 annual salary), New Hampshire (\$20,000 annual salary), New York (\$25,000 annual salary) and Washington (\$20,000 annual salary).

Massachusetts also prohibits the reporting of misdemeanor conviction information where the date of the conviction, release from parole or completion of probation precedes the report by more than five years unless the individual has another conviction within the five years immediately preceding the inquiry. Massachusetts also prohibits the reporting of misdemeanor convictions for simple assault, disturbing the peace, affray and public drunkenness.

IV. OTHER STATE LAW RESTRICTIONS

Similar to the FCRA, some states prohibit the reporting of other, non-criminal information beyond certain time limits. For example, California limits the reporting of the following non-criminal information: (1) bankruptcies that, from the date of the order of relief, antedate the report by more than 10 years, (2) suits that, from the date of filing, and satisfied judgments that, from the date of entry, predate the report by more than 7 years, and (3) any other adverse information that antedates the report by more than 7 years.

Several states limit the reporting of information unless the individual is reasonably expected to earn over a certain level of income. Those states are Kansas (\$20,000 annual salary), Maryland (\$20,000 annual salary), New Hampshire (\$20,000 annual salary), New York (\$25,000 annual salary) and Washington (\$20,000 annual salary). The information that cannot be reported includes: (1) bankruptcies that, from the date of the order of relief, antedate the report by more than 14 years (10 years in Washington and Maryland), (2) suits that, from the date of filing, and satisfied judgments that, from the date of entry, predate the report by more than 7 years, and (3) any other adverse information that antedates the report by more than 7 years.

However, where the FCRA imposes more stringent requirements, the FCRA will control the reporting of information. For example, the income threshold under the FCRA for the reporting of certain information is \$75,000. Thus, for a New York resident having a satisfied judgment over seven years old, even if the individual earns over the \$25,000 income threshold, the information cannot be reported if the individual earns less than the \$75,000 threshold contained in the FCRA.

V. CONCLUSION

As is apparent from this article, there are numerous state and federal statutes that restrict the reporting of information in a background investigative report. I recently attended an industry conference dedicated to legal compliance issues. At that conference, one presentation focused on the rise in the number of lawsuits being filed against employers and background screening companies over background investigations. The speaker shared that there was recently a well-attended seminar for plaintiffs lawyers dedicated solely to methods to sue employers and background screening companies. Compliance is serious business and, without meaning to disparage my fellow lawyers, the wolves are at the door.

RAI views compliance as an integral part of the services we provide to our clients and we are committed to assisting our clients in maintaining a legally compliant background screening program. At RAI, all reports containing derogatory information are reviewed by a supervisor to determine whether the item of information may be reported under applicable law. Managers regularly consult with the General Counsel when questions arise. As always, if you have any questions regarding this article or other compliance issues, do not hesitate to contact me.

Kevin P. Prendergast is the President & General Counsel at Research Associates, Inc., a corporate investigative firm serving clients since 1953. Kevin oversees the compliance program at RAI and works with clients and their counsel in developing legally compliant background screening programs. Mr. Prendergast graduated from the Marshall College of Law and has been licensed to practice law since 1987. He is a member of the Ohio State Bar Association and the Society for Human Resource Management.

Employers should always consult legal counsel regarding what information can be used in evaluating a candidate, as well as for assistance in setting up internal policies and guidelines to ensure that background investigations are performed in accordance with applicable law. RAI is not a law firm and does not provide legal advice.