

## **First Day on the Job and on Notice: When the Statute of Limitations Begins for Employer Background Checks**

Article By:

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Employers began to rethink how they obtain authorization and retrieve background and credit checks for new employees after the Ninth Circuit's decision in [Gilberg v. California Check Cashing Stores, LLC, 913 F.3d 1169, 1177 \(9th Cir. 2019\)](#), as we've [previously discussed](#). However, lower California courts recently decided other issues surrounding background checks, such as the amount of time employees have to file a claim. These recent rulings suggest that the statute of limitations for an employee to file a claim for an alleged violation of federal and/or state background and credit checks laws can begin on the employee's first day of work.

### **Plaintiffs Have Two Years to File a Background Check Claim**

Background check disclosure and authorization forms are required by the Fair Credit Reporting Act ("FCRA"), California's Consumer Credit Reporting Agencies Act ("CCRAA") and Investigative Consumer Reporting Agencies Act ("ICRAA"). Each has a two year statute of limitations. 15 U.S.C. 1681p (earlier of two years from date of discovery or five years from date of the violation); Cal. Civ. Code § 1785.33 (two years from discovery but not more than seven years unless a defendant willfully violated the code); Cal. Civ. Code § 1786.52 (two years from date of discovery). For the two-year limit to apply, employers carry the burden to show that a "reasonably diligent plaintiff would have discovered the facts constituting the violation." [Drew v. Equifax Information Services, LLC., 690 F.3d 1100, 1110 \(9th Cir. 2012\)](#). Yet, proving when a plaintiff discovered that their potential employer retrieved a background check on them can be problematic.

### **Courts Decide That Plaintiffs Can Be on Constructive Notice from Their First Day of Work**

Recent California cases deemed that plaintiffs discovered facts constituting their background check as early as their first day of work.[1] In [Berrellez v. Pontoon Solutions, Inc., 2016 U.S. Dist. LEXIS 142174 at \\*18 \(C.D. Cal. Oct 13, 2016\)](#), an employee was on constructive notice that his new employer pulled a background check on him because, in addition to having his fingerprints taken, he signed consent forms stating he was aware a background check would be performed. At the latest, the employee was on notice on his first day of work, so his claims were barred by the statute of limitations. Thus, the employer's motion for summary judgment was granted.

Additionally, the court in [Ruiz v. Shamrock Foods Company, 2018 U.S. Dist. LEXIS 148929 at \\*16 n.6 \(C.D. Cal. Aug. 22, 2018\)](#), dedicated a lengthy footnote to this issue. Two employees received job offers contingent on receiving satisfactory background checks. Thus, they knew on their first day of work that their employer retrieved background checks on them, because they started work. Although the court decided the case on other grounds, the two employees' claims would have failed because of the two-year statute of limitations. *Id.*

Finally, a reported case from the Northern District of California held that an employee can be on notice from his or her first day of work. In [Rodriguez v. U.S. Healthworks, Inc., 388 F.Supp.3d 1095, 1104 \(N.D. Cal. 2019\)](#), an employee was on constructive notice that her employer retrieved a background check on her because her job offer was contingent on a satisfactory result. Thus, the statute of limitations began to run on the employee's first day of work, similarly to *Ruiz*. Since the employee started work four years prior to filing the lawsuit, her claim was barred by the two-year statute of limitations. The court granted the employer's motion for summary judgment.

### Takeaways

If an employee's position is contingent on a satisfactory background check, the employee is likely aware of any alleged FCRA, CCRAA or ICRAA violations starting with his or her first day of work and would have two years from that day to file a claim.

[1] *Contra*, [Coleman v. Kohl's Department Stores, Inc., 2015 U.S. Dist. LEXIS 135746 at \\*11-13 \(2015\)](#). In *Coleman*, an employer tried to state the statute of limitations ran from the date an employee signed a background check consent form, which was over two years old. However, the employer made this argument in a motion to dismiss which was denied because it was not clear on the face of the complaint that the employer actually pulled the background check on that date.

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