

SENATE THIRD READING  
SB 1262 (Bradford)  
As Introduced February 17, 2022  
Majority vote

## SUMMARY

Requires a superior court clerk to permit filtering searches of publicly accessible electronic court indexes by a defendant's driver's license number, or date of birth, or both.

## Major Provisions

## COMMENTS

*Policy Considerations:* Of the many practical considerations raised by both the bill's proponents and opposition, one of the primary policy questions is deciding what entities should be able to access, compile, and disseminate criminal history information. Criminal history information is quite compelling in the sense that it could influence employers in hiring decisions, and landlords in granting rental applications, among other things.

Managing these databases is integral to ensuring the information they furnish is accurate and maintained properly. California has recent experience with some of the issues that can arise with databases, namely, CalGang, which was a law enforcement database pertaining to gangs that was overseen by two entities functioning independently from the State. (*The CalGang Criminal System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information That May Violate Individuals' Privacy Rights*. California State Auditor. (2016) <[https://www.auditor.ca.gov/reports/search\\_results](https://www.auditor.ca.gov/reports/search_results)> at 1.) The report found that although there were assertions of compliance with federal regulations and state guidelines, there was scant evidence to suggest those standards were met. (*Id.* at 1.) The report found numerous instances where information was either unreliable, inaccurate, and used inappropriately. (*Id.* at 1-2.) As a result, the Legislature transferred management of the database to the DOJ and set policies, procedures, and oversight for the future use of shared gang databases. (See AB 90 (Weber) Chapter 695, Statutes of 2017; Penal Code, Section 186.34 et seq.)

When it comes to consumer reporting agencies, there are several federal and state regulations in place that are designed to ensure reliability and accuracy of background checks. However, there is little oversight of such entities. This could potentially be why there is a growing number of lawsuits against such companies, like Checkr, that make accusations of erroneous background checks costing people chances at employment. (*Locked out of the gig economy: When background checks get it wrong*. Protocol. (2020) <<https://www.protocol.com/checkr-gig-economy-lawsuits>> [as of Jun. 17, 2022].) The company is said to process approximately 1.5 million background checks every month, however:

Since 2015, Checkr has faced some 80 lawsuits under the Fair Credit Reporting Act, which regulates both credit reports and background checks... Roughly half of those suits have been filed in the last year alone. In court documents, the plaintiffs have accused Checkr of a wide range of wrongdoings, from mistaking them with other people to misreporting their offenses to including past criminal activity that is too old to report under the law... These cases, some of which have been dismissed or ended in confidential settlements, represent only a fraction

of the complaints about Checkr flooding Twitter and online review sites, like the Better Business Bureau. (*Ibid.*)

Individuals can dispute these errors by accessing Checkr's online portal, but in order to access that portal, the individuals must check a box agreeing to Checkr's terms of service, which includes an arbitration provision. (*Ibid.*) Although arbitration can be beneficial in some ways, it can be detrimental in other ways. "By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices."

(*Arbitration Everywhere, Stacking the Deck of Justice*. The New York Times. (2015)

<<https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>> [as of Jun. 17, 2022].)

Although this bill only deals with search filters for court indexes, it poses the critical question of how California should approach the availability and accessibility of criminal history information. Should there be a move towards a centralized database available through the DOJ, or should there be decentralization of such information? In either situation there would still likely be a need for greater oversight and accountability.

### **According to the Author**

"SB 1262 will return public court record access to the status quo by allowing an individual to search and filter results by someone's date of birth and driver's license number. This bill is in response to a recent court decision which called for the removal of two identifiers (date of birth and driver's license number) from public court records. Many courts have since removed the ability to search and filter records based on date of birth and/or driver's license number.

The All of Us or None vs Hamrick decision did not prohibit the use of background checks entirely, nor did it prohibit being able to search the court indexes. Companies, nonprofits, apartment owners, and others will continue to perform background check on applicants, regardless of the outcome of this bill. Whether it be for liability or insurance purposes, or an organization wanting to maintain the safest environment, the Hamrick decision does not change these practices. But by prohibiting the use of these identifiers when searching, we are allowing a delay in that person's background check being completed and their application accepted, even if the applicant provided those identifiers willingly for the purpose of a background check."

### **Arguments in Support**

According to *Checkr*, "As a Consumer Reporting Agency ('CRA') regulated under the federal Fair Credit Reporting Act ('FCRA') and California's Investigative Consumer Reporting Agencies Act ('ICRAA'), Checkr conducts background checks for statutorily authorized purposes, including employment, volunteering, and independent contracting. FCRA and ICRAA contain a number of protections for individuals during this process, including limiting the types of information that can be included on a background check; for example, under ICRAA, non-convictions and expunged records cannot be reported, and convictions can only be reported for seven years.

"As part of the background check process for the purposes listed above, an individual provides their written consent to a background check and certain personally identifying information such as name and date of birth ('DOB'). Based on this information, Checkr conducts a search of a court's electronic index to determine whether there are records that should be included in the

background report. Prior to May 2021, Checkr could search a court's electronic index by using an individual's name and DOB to determine whether there were any associated records. If no results returned, then the search was complete. If records were returned, then Checkr would conduct a clerk-assisted search to retrieve more information about the record to determine whether the record belonged to the individual at issue and whether the record should be included in the background check. A clerk-assisted search would usually take a few days to complete. Given the ability to conduct searches with unique identifiers such as DOB, searches requiring clerk assistance were limited (approximately 8%, prior to May 2021)...

"The removal of DOB as a search field has resulted in substantial delays in the background check process for individuals with common names and criminal records. Due to the inability to filter out results by a unique identifier like DOB, the number of searches requiring a clerk-assisted search has nearly doubled from 8% to 14% of all searches. This means that the number of searches requiring clerk assistance has gone from tens of thousands to more than six figures. This has created a substantial backlog for these searches, resulting in these checks taking weeks to months as opposed to a few days prior to May 2021. Not only do these delays impact people with criminal records, but it also affects those with common names. Based on the data in Checkr's system, these delays disproportionately impact individuals with Spanish surnames (see Appendix A, top 50 impacted names of delayed background checks). Looking at searches conducted in Los Angeles County (one of the first courts to remove the ability to search by DOB), Checkr has been averaging more than 20,000 background checks that have been pending for more than 30 days. The most impacted individuals all have Spanish surnames.

"Similarly, searches requiring clerk assistance have effectively reached a standstill in Sacramento County, where DOB was removed as a search parameter a few months ago. There are currently six thousand background checks requiring clerk assistance, most of which are taking two months to complete. At the current rate – and with the growing backlog of searches requiring clerk assistance – processing of these checks has effectively come to a standstill, thereby preventing these individuals from getting to work..."

### **Arguments in Opposition**

According to *Root & Rebound*, "Courts do not collect date of birth information in civil cases; however, they do in criminal cases. (Penal Code Section 11325.) Compiling criminal records with date of birth information helps criminal justice agencies create and share 'accurate and reasonably complete criminal offender record information' with one another 'for the performance of their official duties.' (Penal Code Section 13100.) Aside from criminal justice agencies, only those with a 'compelling need' can access criminal records compiled with the date of birth information. These include schools, nursing homes, licensing boards, and others who can show a 'compelling need' for the information. (Penal Code Section 11105, 13300.)

"The constitutional right to privacy restricts access to the criminal information compiled by criminal justice agencies. It prevents 'government and business conduct in . . . misusing information gathered for one purpose in order to serve other purposes' and 'to afford individuals some measure of protection against this most modern threat to personal privacy.' (White v. Davis (1975) 13 Cal.3d 757, 774.)..."

"It is clear how commercial reports have come to cost less and become more instant than official DOJ rap sheets. Local courts are allowing commercial background check companies to access the criminal records compiled with the date of birth information for law enforcement purposes.

The market for this cheap, instant information has grown exponentially in recent years. The Consumer Financial Protection Bureau (CFPB) cites a 2016 industry survey that approximately 59 percent of employers conduct criminal background checks. The number rose to nearly 90 percent by 2018. Due largely to the increasing demand, fueled by relentless marketing stoking our collective bias against "the felons," the background check industry collected a revenue of \$3.2 billion in 2019 alone. A small piece of the pie goes to courts. For example, the Los Angeles County Superior Court reports that it makes an annual revenue of about \$7 million through its website that filters its 'criminal index' by date of birth or driver's license number.

"SB 1262 claims that the delay in commercial background checks caused by the Hamrick ruling 'disproportionately impacts individuals with common names and prevents these individuals from being able to secure work or housing on a timely basis.' However, we have yet to see evidence to support this claim. Instead of being denied work or housing, some formerly incarcerated people report that they are allowed to work or rent on a probationary basis while the background check results are pending.

"On the other hand, we know that the delay is in reducing the background check companies' margins and increasing the cost of a commercial background check. In this era of mass incarceration and collateral consequences, the Court's ruling asks us how much we are willing to pay for our biases against the formerly-incarcerated or convicted people. When a commercial background check costs more and takes longer, we would really have to believe in its utility to buy and use it.

"The Court's ruling disrupts the existing commercial market for criminal history information. The ruling certainly makes it more expensive, although not impossible, to compile a job applicant's criminal history. In response to the aftermath of the ruling, an industry group explains that each report requires "hundreds of criminal case files to be reviewed" manually. Employers with a compelling need can access DOJ rap sheets. Those without must be willing to bear the cost of a manual review process.

"SB 1262 erases the distinction between these two groups. Anyone, with or without a compelling need, would have access to the information compiled for law enforcement purposes. The bill affirms the self-serving argument of commercial background check companies that one's criminal history is always relevant and, therefore, should be made readily available to everyone."

## **FISCAL COMMENTS**

According to the Assembly Appropriations Committee, Judicial Council of California (JCC) reports costs will be minor and absorbable for superior courts to program their case management systems to comply with the requirements of the bill.

## **VOTES**

### **SENATE FLOOR: 37-0-3**

**YES:** Allen, Atkins, Bates, Becker, Borgeas, Bradford, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hueso, Hurtado, Jones, Kamlager, Laird, Leyva, Limón, McGuire, Melendez, Min, Newman, Nielsen, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk

**ABS, ABST OR NV:** Archuleta, Caballero, Hertzberg

**ASM PUBLIC SAFETY: 5-0-2**

**YES:** Lackey, Mia Bonta, Bryan, Santiago, Seyarto

**ABS, ABST OR NV:** Jones-Sawyer, Quirk

**ASM APPROPRIATIONS: 15-0-1**

**YES:** Holden, Bigelow, Bryan, Calderon, Carrillo, Megan Dahle, Davies, Mike Fong, Fong, Gabriel, Levine, Quirk, Robert Rivas, Akilah Weber, Wilson

**ABS, ABST OR NV:** Eduardo Garcia

**UPDATED**

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