

FCRA Preemption of Texas' 7-Year Criminal Conviction Reporting Limit

SUMMARY

Texas' Business and Commerce Code Section 20.05 limits consumer reporting agencies (background screening companies) from reporting criminal convictions older than seven years to employers. However, this limitation was pre-empted by revisions to the federal Fair Credit Reporting Act (FCRA) before the Texas statute was even passed.

BACKGROUND

Prior to 1997, background screening companies were prohibited under the FCRA from reporting criminal convictions older than 7 years to employers, unless the individual was expected to earn more than \$75,000 annually. This prohibition included murder, sexual assault, and violent crimes, as well as any other less-serious offenses.

Congress saw the obvious problem with this restriction and removed it from the FCRA in the Consumer Credit Reporting Reform Act of 1996 (passed as part of the [Omnibus Consolidated Appropriations Act, 1997](#)).

After the federal restriction was removed, a few states added identical or similar restrictions to their state consumer reporting law. However, the crafters of the FCRA amendment anticipated this and placed a prohibition on these kinds of state-specific restrictions, invalidating them before they were even passed.

THE STATUTE

Here's how the preemption reads in the current FCRA¹:

§ 625. Relation to State laws [15 U.S.C. § 1681t]

(b) *General exceptions.* No requirement or prohibition may be imposed under the laws of any State

(1) with respect to any subject matter regulated under...

(E) section 605 [§ 1681c], relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law **in effect on the date of enactment** of the Consumer Credit Reporting Reform Act of 1996;

Public Law 104-208 containing the Consumer Credit Reporting Reform Act of 1996 was **enacted** (signed by the President) as part of the [Omnibus Consolidated Appropriations Act, 1997](#) on September 30, 1996.

¹ Through the Consumer Financial Protection Act of 2010 (CFPA) (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203).

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Texas Business and Commerce Code Section 20.05 (which limits reporting of convictions to 7 years) was effective on 10/01/1997 - -- more than a year after the enactment of the CCRRA.

LEGAL TEST

In *Simon v. DIRECTV*,² the Court recognized that the FCRA's preemption applied to Colorado's reporting limit, which was passed after the September 30, 1996.

HISTORY

On a side note, the original state law preemption included in the Consumer Credit Reporting Reform Act of 1996 was set to expire on 01/01/2004. The Fair and Accurate Credit Transactions Act of 2003 (the FACT Act or FACTA) removed the reference to the expiration [formerly section 624(d)(2) or 15 U.S.C. 1681t(d)(2)], as reflected in the current law.

² *Simon v. DIRECTV, Inc.*, 2010 U.S. Dist. Lexis 35940 (D. Colo. Mar. 19, 2010)