

Legal Update: Tucker, Background Checks, and Conviction Disqualifiers

Personnel Testing Council of Southern
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Tucker – Facts

Tucker laid off from Director of Operations

Applied for Maintenance manager

Tucker was qualified but District chose an outside applicant

Tucker

Section 45298 provides:

- “Persons laid off because of lack of work or lack of funds are eligible to reemployment for a period of 39 months and shall be reemployed in preference to new applicants.”

Section 45308 provides :

- “Classified employees shall be subject to layoff for lack of work or lack of funds. Whenever a classified employee is laid off, the order of layoffs within the class shall be determined by length of service. The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first.”

Tucker – Holding

District must give laid-off employees preference for reemployment in a position for which they are qualified.

The position does not need to be in the same class as the employee's previous position for preference to apply.

Section 45298 does not provide a guarantee of employment to a laid off employee.

- A district may set its own hiring criteria
- Laid off employee must meet the criteria.


Tucker – The Saga Continues

Plaintiff laid off and reemployed in a lower position

Released from probation

Argued she was a permanent employee

CSEA. v. Governing Bd. of the East Side of Union High School Dist. (2011)
193 Cal.App.4th 540.



Plaintiff argued that the reemployment preference under *Tucker* and section 45298 meant that she was permanent in the new position


Court found that the right to reemployment does not mean employee retains permanence in the new position

And continues...

Plaintiff laid off as Director of Special Projects
argued that less senior Director of Operations
should have been laid off

Court found that plaintiff could not bump into a
position which was occupied

Hernandez v. Palo Verde USD (2011)
2011 WL 1314463 (unpublished).



argued that section 45308 required District to lay off employee with less seniority in a position he previously held

Court found plaintiff wanted to bump employee

Tucker addresses the fear that laid off

employee has inappropriate priority over

employees, “Nothing in the statutory provisions

gives the laid-off employee the right to a

position currently held by another employee.”

Tucker – What we've learned

Tucker does not

- Guarantee reemployment
- Prohibit probationary period in reemployed position
- Allow employees to bump into occupied positions

Tucker does require Districts to offer vacant positions to qualified people on the reemployment list

AB 218

July 1, 2014 - adds Labor Code section 32.9

a) Agency shall not ask about “information concerning the conviction history of the applicant . . . until the agency has determined the applicant meets the minimum employment qualifications.”
includes asking on an application

Labor Code section 432.9

”This section shall not be construed to prevent a state or local agency from conducting a conviction history background check after complying with all of the provisions of subdivision (a).”

Labor Code section 432.9

“This section shall not apply to a position for which a state or local agency is otherwise required by law to conduct a conviction history background check, to any position within a criminal justice agency . . . or to any individual working on a temporary or permanent basis for a criminal justice agency.”

Background Investigations Required:

No employee may work for a school who has been convicted of specified crimes involving controlled substances, sex crimes, and violent felonies.

Applicants for classified positions may not be employed until the criminal check has been completed.

Labor Code section 432.9

f) Section 433 does not apply to this section.

Section 433 - “Any person violating this article is guilty of a misdemeanor.”

Penal Code section 11105

Section 11105(t) provides that

- When DOJ furnishes criminal history information
- For “employment, licensing, or certification purposes,”
- If the agency makes an adverse decision
- Agency must expeditiously furnish a copy of the information
- To the last known contact address

Reference Checks Online

Common sources used by employers:

Social networking sites

– MySpace/Facebook

YouTube

Google

Restrictions on Reference Checks

AB 1844

AB 1844 prohibits employers from requiring or requesting an employee or applicant to:

- Disclose a username or password for the purpose of accessing personal social media,
- Access personal social media in the presence of the employer, or
- Divulge any personal social media.

Restrictions on Reference Checks

The EEOC, Criminal Records, and Discrimination

acially neutral policies having a disparate impact on protected group are unlawful under Title VII unless they are also “job related and consistent with business necessity.”

See EEOC, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (4/25/2012), available at:

http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Restrictions on Reference Checks

The EEOC, Criminal Records, and Discrimination

Employment exclusions made on account of an employee's previous criminal conduct are considered "job related and consistent with business necessity" only if the risks associated with the nature of the position are enhanced by the applicant's previous criminal conduct.

Restrictions on Reference Checks

Targeted Screening

To determine whether risks associated with the nature of the position are enhanced by the applicant's previous criminal conduct, employers must consider:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence;
- The nature of the job held or sought.

Restrictions on Reference Checks

Individualized Assessment

The EEOC recommends using “individualized assessments” in conjunction with targeted screening. An individualized assessment is a three-step process that requires:

- Informing an individual that he/she may be excluded because of past criminal conduct;
- Offering that individual the opportunity to demonstrate that the exclusion should not apply to him/her;
- Deciding whether the individual should continue to be excluded after taking account of his/her individual circumstances.

Restrictions on Reference Checks

Relevant Considerations

An individualized assessment should consider:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct.

Restrictions on Reference Checks

Relevant Considerations (Cont.)

- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Employment Eligibility

The I-9 form –
new for 2013

Have employee fill out
Section 1 on first page

| Employment Eligibility Verification | | USCIS | |
|---|-----------------------------|---------------------------|--------------|
| Department of Homeland Security | | Form I-9 | |
| U.S. Citizenship and Immigration Services | | OMB No. 1615-0047 | |
| | | Expires 03/31/2016 | |
| <p>▶ START HERE. Read instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against a qualified individual. Employers CANNOT specify which documents they will accept from an employee. The refusal to hire an individual because the document presented has a future expiration date may also constitute illegal discrimination.</p> | | | |
| <p>Section 1. Employee Information and Attestation (<i>Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.</i>)</p> | | | |
| Last Name (Family Name) | | Other Names Used (if any) | |
| First Name (Given Name) | | Middle Initial | |
| Address (Street Number and Name) | | Apt. Number | City or Town |
| | | State | Zip Code |
| Date of Birth (mm/dd/yyyy) | U.S. Social Security Number | Telephone Number | |
| | | | |
| <p>I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.</p> <p>I attest, under penalty of perjury, that I am (check one of the following):</p> <p><input type="checkbox"/> A citizen of the United States</p> <p><input type="checkbox"/> A noncitizen national of the United States (See instructions)</p> <p><input type="checkbox"/> A lawful permanent resident (Alien Registration Number/USCIS Number): _____</p> <p><input type="checkbox"/> An alien authorized to work in the U.S. (expiration date, if applicable, mm/dd/yyyy) _____. Some aliens may write "N/A" in this field. (See instructions)</p> <p>For aliens authorized to work, provide your Alien Registration Number OR USCIS Number OR Form I-94 Admission Number:</p> <p>1. Alien Registration Number/USCIS Number: _____</p> <p style="text-align: center;">OR</p> <p>2. Form I-94 Admission Number: _____</p> <p>If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:</p> <p>Foreign Passport Number: _____</p> <p>Country of Issuance: _____</p> <p>Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)</p> | | | |
| Signature of Employee: | | Date (mm/dd/yyyy): | |
| | | | |
| <p>Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.)</p> <p>I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.</p> | | | |
| Signature of Preparer or Translator: | | Date (mm/dd/yyyy): | |
| | | | |
| Last Name (Family Name) | | First Name (Given Name) | |
| Address (Street Number and Name) | | City or Town | State |
| | | Zip Code | |
| | | | |

Employment Eligibility

Check documents
and fill out Section 2
on the second page

Retain in personnel file
separately

Section 2. Employer or Authorized Representative Review and Verification
Employers or their authorized representatives must complete and sign Section 2 within 30 days of the employee's first day of employment. You must physically examine one document from List A OR examine a combination of one document from Lists B and C. See instructions for "List of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.

Employee Last Name, First Name and Middle Initial from Section 1: _____

| List A Identify and Employment Authorization | OR | List B Identify | AND | List C Employment Authorization |
|---|----|--|-----|--|
| Document Title: _____ | | Document Title: _____ | | Document Title: _____ |
| Issuing Authority: _____ | | Issuing Authority: _____ | | Issuing Authority: _____ |
| Document Number: _____ | | Document Number: _____ | | Document Number: _____ |
| Expiration Date: (#any)(mm/dd/yyyy): _____ | | Expiration Date: (#any)(mm/dd/yyyy): _____ | | Expiration Date: (#any)(mm/dd/yyyy): _____ |
| Document Title: _____ | | 3-D Barcode Do Not Write in This Space | | |
| Issuing Authority: _____ | | | | |
| Document Number: _____ | | | | |
| Expiration Date: (#any)(mm/dd/yyyy): _____ | | | | |
| Document Title: _____ | | | | |
| Issuing Authority: _____ | | | | |
| Document Number: _____ | | | | |
| Expiration Date: (#any)(mm/dd/yyyy): _____ | | | | |

Certification
 I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.
 The employee's first day of employment: (mm/dd/yyyy) _____ (See instructions for exemptions.)

| | | |
|---|--------------------------------|---|
| Signature of Employer or Authorized Representative: _____ | Date: (mm/dd/yyyy) _____ | Title of Employer or Authorized Representative: _____ |
| Last Name (Family Name): _____ | First Name (Given Name): _____ | Employer's Business or Organization Name: _____ |
| Employer's Business or Organization Address (#street number and name) City or Town: _____ | | State: _____ Zip Code: _____ |

Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)
 A. New Hire (if applicable) Last Name (Family Name): _____ First Name (Given Name): _____ Middle Initial: _____ Date of Rehire (if applicable) (mm/dd/yyyy): _____

C. If employee's previous grant of employment authorization has expired, provide the information for the document from List A or List C the employee presented that establishes current employment authorization in the space provided below.
 Document Title: _____ Document Number: _____ Expiration Date: (#any)(mm/dd/yyyy): _____

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s) the document(s) I have examined appear to be genuine and to relate to the individual.

| | | |
|---|---------------------------|--|
| Signature of Employer or Authorized Representative: _____ | Date: (mm/dd/yyyy): _____ | First Name of Employer or Authorized Representative: _____ |
|---|---------------------------|--|

Form I-9 03/08/13 N Page 8 of 9

Disability Discrimination

Is a neo-natal ICU nurse's exemption from her employer's absence policy a reasonable accommodation for a disability?

Samper v. Providence St. Vincent Medical Center (9th Cir. 2012) 675 F.3d 1233.

FEHA

Volunteer reserve officer could not sue
for disability discrimination under FEHA
because he was not an employee.

Estrada v. City of Los Angeles (2013) 218
Cal.App.4th 143.

Minimum Wage

July 1, 2014, the minimum wage will increase from \$8.00 per hour to \$9.00 per hour.

January 1, 2016, it will be raised again to \$10.00 per hour.

Currently, exempt employees must earn at least \$2,773.33 per month.

July 1, 2014, that amount will increase to \$3,120.00 per month.

January 1, 2016, exempt employees will need to earn at least \$3,466.67 per month.

Independent Contractors

District manager is independent contractor

Duties were recruiting insurance agents; train and motivate the agents; and represent Farmers in matters made by agents she recruited

Key is the right to control

- She controlled hours
- Supervised her own staff
- Paid for her costs

Beaumont-Jacques v. Farmers Group, Inc. (2013)
217 Cal.App.4th 1138.

Interns

Unpaid intern suits

Interns argue that they are treated as employees

Agency should be careful - evaluate whether an intern is learning or doing your work

Thank You!

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