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PERSONNEL TESTING COUNCIL (PTC) MAY LUNCHEON

Legal Updates: "Ban the Box" and Other Issues Affecting California Employers

5/14/2014

PRESENTED BY:

Meredith Karasch

Legal Update: "Ban the Box" and Other Issues Affecting California Employers

Personnel Testing Council (PTC) | May 14, 2014

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Tension

- Employers want the best qualified employees
- Employers have a duty to ensure safety

vs.

- Need to balance privacy rights
- And what information is job related

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The law as it stands today

- Background checks are required in some cases
- But government is becoming increasingly suspicious
- Recently, laws are being passed to restrict background checks

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Types of Background Checks

- Pre-Employment Testing
- Social Media
- Credit Reports
- Medical Examination
- Criminal History

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Online Information

Common sources used by employers

- Social networking sites
 - MySpace/Facebook/Twitter
- YouTube
- Google
- Privacy Concerns

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Restrictions on Social Media Checks

Labor Code § 980

- 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.

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Credit Reports

- Recent amendments to the ICRA restrict right to obtain a credit report
- Now limited to
 - Fiscal positions
 - Management positions
 - Law enforcement positions
- Employer must give written notice of the specific reason for obtaining the report

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Medical Examinations

- Employers may obtain medical information and examinations if:
 - all individuals in the same job category are asked the same questions, and
 - employer can demonstrate a job-related business necessity for the inquiry
- Any medical examination must occur after a conditional offer and is the LAST step

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Use of Criminal Information



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California Law

- Labor Code § 432.7
 - May not refuse to hire based on arrest
- Labor Code § 432.8
 - May not ask about marijuana convictions over 2 years old

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Restrictions on Using Megan’s Law Information

- Requires law enforcement to make information about sex offenders public
- Allows information regarding registered sex offenders to be used to “protect a person at risk.”
- Does not allow information to be used for employment, health insurance, credit, education, and housing decisions

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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

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The EEOC, Criminal Records, and Discrimination

Facially neutral polices having a disparate impact on a 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

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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.

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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 or completion of the sentence;
 - The nature of the job held or sought.

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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.

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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.

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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.

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Why?

- Increase in convictions due to stricter drug laws
- Prevent recidivism
- Prevents unconscious bias
- Decreases societal costs

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Why not?

- Will increase employment for criminals
- Employers are worried about safety

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AB 218

“The Legislature finds and declares that reducing barriers to employment for people who have previously offended, and decreasing unemployment in communities with concentrated numbers of people who have previously offended, are matters of statewide concern.”

“The Legislature further finds and declares that, . . . increasing employment opportunities for people who have previously offended will reduce recidivism and improve economic stability in our communities.”

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AB 218

- July 1, 2014 - adds Labor Code section 432.9
- (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*

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Labor Code section 432.9

- (c) "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)."

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Labor Code section 432.9

- (d) As used in this section, "state agency" means any state office, officer, department, division, bureau, board, commission, or agency.
- (e) As used in this section, "local agency" means any county, city, city and county, including a charter city or county, or any special district.

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Labor Code section 432.9

- (b) "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, as that term is defined in Section 13101 of the Penal Code, or to any individual working on a temporary or permanent basis for a criminal justice agency."

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Positions requiring background checks

- Law enforcement
- Certificated positions in schools
- Classified positions in schools
- Employees in "child care services"

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Classified and Academic Employees: Sex and Drug Offenses

- Shall not hire or retain if convicted of specified sex or drug offenses
- Shall not hire or retain "sexual psychopath"
- Classified employees may be hired with a drug offense where conviction is reversed, and the person is acquitted or the charges are dismissed
- Classified employees may be hired with drug offense if rehabilitated for 5 years.
- Applicants for classified positions may not be employed until the criminal check has been completed.

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Labor Code section 432.9

- (f) Section 433 does not apply to this section.
- Labor Code section 433: "Any person violating this article is guilty of a misdemeanor."

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Timing?

- Application
- Interviews
- Conditional Offer
- Medical Examination
- Hiring

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Looking to the Future

- Expect that restrictions will not lower
- Make sure hiring decisions are based on legitimate concerns based on business necessity
- Make sure you can articulate a non-discriminatory reason for failure to hire an applicant

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Thank You!

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