

PALMER KAZANJIAN
WOHL HODSON LLP
2022

PRIVACY & CONFIDENTIALITY IN THE WORKPLACE

(916) 442-3552 | www.pkwhlaw.com | Facebook/LinkedIn: @palmerkazanjian



RESTRICTIVE COVENANTS AND NON-COMPETE PROVISIONS

BROAD RESTRICTIVE COVENANTS ARE GENERALLY INVALID IN CALIFORNIA



- ***“Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”*** Business and Professions Code section 16600.
- Broad covenant not to compete is generally invalid.
 - Unfair Competition Law. B&P Code section 17200
 - Wrongful termination action
 - Choice of Law provisions

BROAD RESTRICTIVE COVENANTS ARE GENERALLY INVALID IN CALIFORNIA



- Limited exceptions to B&P Code section 16600
 - Trade secret protections
 - Sale of business interest (geographic and reasonableness limitations)
 - Dissolution of partnership (geographic and reasonableness limitations)

BROAD RESTRICTIVE COVENANTS ARE GENERALLY INVALID IN CALIFORNIA



- Non-solicitation of customers provision (considered covenant not to compete).
- Non-solicitation of employees provision (held enforceable until recently – now in doubt)
- Duty of loyalty during employment: announce upon departure



TRADE SECRETS

PROTECTING TRADE SECRETS FROM MISAPPROPRIATION



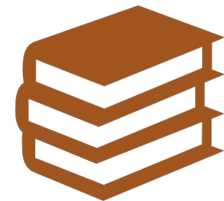
California Uniform Trade Secrets Act
(Civil Code section 3426 *et seq.*)

- Derives independent economic value from being secret
- Reasonable efforts to maintain secrecy

PROTECTING TRADE SECRETS FROM MISAPPROPRIATION

Misappropriation includes:

- Acquisition with knowledge of improper means
- Disclosure or use, without consent, by one who used improper means
- Accident/mistake, after knowledge of protected status



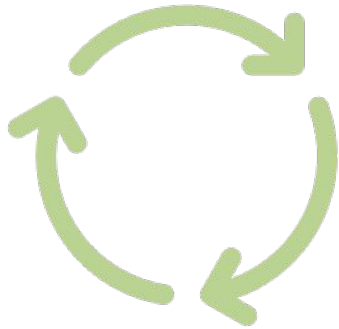
PROTECTING TRADE SECRETS FROM MISAPPROPRIATION



Other Protective Laws

- Defend Trade Secrets Act (federal)
- Theft of Trade Secrets (Penal Code section 499c)
- Economic Espionage Act (federal)

PROTECTING TRADE SECRETS FROM MISAPPROPRIATION



Remedies Available

- Injunctive Relief (court order to stop)
- Civil Seizure (federal)
- Actual Damages: Royalties
- Liquidated Damages
- Attorneys Fees



GENERAL & CRIMINAL BACKGROUND CHECKS

PROCESS FOR EMPLOYMENT SCREENING



Fair Credit Reporting Act
(federal)

Investigative Consumer
Reporting Agency Act
(state)

PROCESS FOR EMPLOYMENT SCREENING



Common Elements:

- Proper Disclosure and Notice (separate and precise)
- Notice of Adverse Action
- Opportunity to Access Report

PROCESS FOR EMPLOYMENT SCREENING



Common Violations

- Failing to separate disclosure from application
- No notice or consent
- Reasonable time to dispute
- Failing to notify action based on screening
- Not furnishing copy of report and related materials

FAIR CHANCE ACT – BAN THE BOX LAW



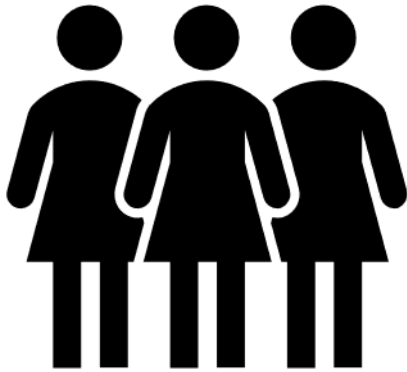
Applicant's Conviction History

- General restrictions (Labor Code section 432.7)
- Conditional offer of employment
- Individual assessment: nature of offense, time, nature of job
- Notice and response opportunities
- Right to Appeal



MEDICAL EXAMINATIONS

MEDICAL EXAMINATIONS PRIOR TO EMPLOYMENT



Americans with Disability Act (federal)
Fair Employment and Housing Act
(state)

- Conditional offer of employment
- Same job classification
- Job related and Consistent with business necessity
 - Impair ability to perform
 - Direct threat

MEDICAL EXAMINATIONS DURING EMPLOYMENT



Job related and Consistent with business necessity

- Impair ability to perform
- Direct threat
- Accommodation request
- Know Observes Attributes
- Credible third party



DRUG AND
ALCOHOL
TESTING

CONSTITUTIONAL RIGHT TO PRIVACY



- Illegal use not protected under ADA
- California constitution guarantees individual right to privacy
- Intrusion (right to privacy) weighed against legitimate interest in regulating

CONSTITUTIONAL RIGHT TO PRIVACY



- Pre-Employment Screening (strong interest outweighs intrusion and expectation – consent)
- Current Employee Screening
 - Reasonable suspicion (post accident)
 - Advance notice (opportunity to consent) and establish legitimate interest
 - Safety sensitive (random)

CONSTITUTIONAL RIGHT TO PRIVACY



What about medicinal marijuana?

- Ross v. Ragingwire Telecommunications (Cal Supreme Court): no requirement to accommodate medical marijuana.
- Other state statutory obligation to accommodate.
- Strictly recognize violation – Consider alternative enforcement options (return to work agreement).



MEDICAL RECORDS

KEEPING MEDICAL RECORDS CONFIDENTIAL



Confidentiality of Medical Information Act

- Applies to all employee medical records
- Written authorization required to disclose
- Except: court compelled, administer plans, workers compensation, medical leave
- Good faith

KEEPING MEDICAL RECORDS CONFIDENTIAL



American with Disabilities Act

- Employee medical records
- Separate confidential file
- Access only to management, safety personnel, government

KEEPING MEDICAL RECORDS CONFIDENTIAL

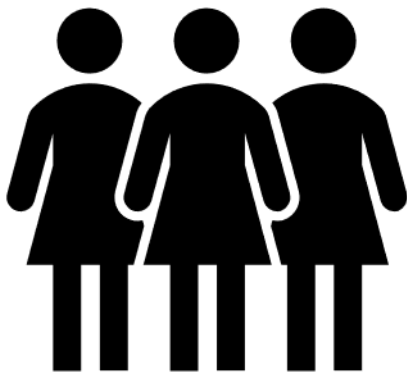


Health Insurance Portability and Accountability Act

Covered entities: health plans, health care clearinghouse, health care providers, business associates

- Access notice to employees
- Training on appropriate access and handling
- Appoint privacy officer
- Establish policies and procedures
- Sanctions for failing to follow
- Business associate agreements

KEEPING MEDICAL RECORDS CONFIDENTIAL



Privacy Rule

- Protects personal health information
- Individually identifiable
- Held or transmitted in any format
- Authorization to use or disclose

KEEPING MEDICAL RECORDS CONFIDENTIAL



Electronic Security Rule

- Protects personal health information
- Burden on covered entity and business associate
- Secure PHI in electronic form
- Severe fines and notification breach



PERSONNEL RECORDS

KEEPING PERSONNEL RECORDS CONFIDENTIAL



Electronic Data Privacy (Civil Code section 1798.82)

- Name +
 - SSN (CC 1798.85)
 - Driver's license (CC 1798.80)
 - Credit information (CC 1785.20.5)
 - Medical information
 - Health insurance information
- Reasonable security and notice of breach

KEEPING PERSONNEL RECORDS CONFIDENTIAL




Employee Access to Records (Labor Code section 1198.5)

- Right to inspect and receive copy
- Written request
- Production in 30 days
- Common use as fishing expedition
- Payroll records as well (Labor Code section 226 and IWC Orders)



QUESTION & ANSWER?



**Palmer Kazanjian
Wohl Hodson LLP,**
2277 Fair Oaks Blvd.,
Ste. 455,
Sacramento, CA 95825

916.442.3552

www.pkwhlaw.com

Facebook/LinkedIn:
[@palmerkazanjian](#)



CONTACT INFORMATION