



Privacy in the Workplace

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Agenda

- Background Checks
- Drug and Alcohol Testing
- Employee Records
- California Privacy Rights Act
- Employee Privacy in the Workplace

Background Checks

Background Checks Generally

- Employers can ask questions about background or require a background check
- Federal law still applies; employment decision based on background check cannot discriminate based on membership to a protected class
- Must comply separately with *each* set of statutory requirements for federal and state reporting statutes, provide individual notices and report disclosures
- FCRA (federal) and ICRAA (CA) similar in requirements but necessary to do both if applicable

FCRA, ICRAA & CCRAA

- FCRA
 - Only applies if using third party to conduct investigation
- ICRAA
 - Cannot perform checks without consent
 - Only allows reporting of criminal convictions
 - Disclosure must include information obtained through “any means,” even public records
 - Does not include credit reports (CCRA); character information only
- CCRAA
 - Consumer credit information only
 - CA prohibits most employers from obtaining under most circumstances; can be used in evaluation or promotion of employee
 - Legitimate business need to access credit record
 - DOJ
 - Managerial positions
 - Law enforcement
 - Those who have access to personal/secret information or large sums of money
 - Similar notice requirements

In Detail: Prior to Conducting a Background Check

- Must perform the background check identically for each applicant or employee
 - *E.g.*, may not only ask employees of a certain race about credit history
 - Can almost never use genetic information to make an employment decision
- Inform the employee or applicant that you will use the information for decisions about their employment
 - In writing, separate and distinct notice
 - No additional information that can confuse applicant
 - Inform of right to known nature and scope of investigation
- Receive written permission to do the background check; this can be included in notice
 - Requesting continued permission to do so must be clear and conspicuous

In Detail: Using Background Information

- Must apply background information-based criteria equally
- Before taking an adverse employment action based on background check findings, FCRA requires notice given regarding employee rights
- After taking such adverse employment action, must state:
 - Rejected because of information in the report;
 - Contact information of the company that sold the report;
 - That the company selling the report didn't make the hiring decision; and
 - That they have a right to dispute the accuracy and completeness of the report, and to receive free copy within 60 days.

Ban-the-Box Laws: Fair Chance Act

- Prohibits employers with 5+ employees from asking about conviction history before conditional job offer
- No written or oral inquiry into conviction history before conditional offer
- Cannot consider information about any actions that did not result in convictions and/or if the records were sealed/expunged/etc. at any point
- After condition offer has been made, can ask about actual convictions
- Must engage in individual assessment (*i.e.*, not categorically) when deciding whether to rescind offer based on conviction history
- Notification of complete rationale behind decision to rescind and report

Medical Examinations: EEOC Guidance

- Americans with Disabilities Act (federal) and Fair Employment and Housing Act (state) govern
- Can give conditional offer of employment to those who qualify but for disability-related shortcomings
- Reason to fire or not hire must be job related and consistent with business necessity; can also be performed during employment, provided:
 - Must impair ability to perform essential functions
 - Must be direct threat to employer's business
- Current employees being examined and evaluated for termination due to shortcomings also entitled to accommodation request
 - Credible third party can attest to disability

Drug and Alcohol Testing

Expectation of Privacy

- *Hill v. NCAA*
 - How to establish invasion of privacy:
 - Legally protected privacy interest
 - Reasonable expectation of privacy
 - Serious invasion of privacy
 - Employer may then rebut with countervailing interest
 - Consider whether there is a less intrusive manner to get information
 - For current employees, must be able to demonstrate legitimate or important interest
 - Requires notice to employee
 - Must act on at least reasonable suspicion of substance use
- When is a test required during employment generally?
 - After an accident
 - Reasonable suspicion of use
 - Randomly, if consented to before employment begins and non-discriminatory, mathematical means for doing so

Testing Before Hiring

- Generally allowed for employers in the private sector to test for drug use before hiring if:
 - Notice given to applicants that drug testing is part of the application process;
 - Job offered and the offer is contingent on passing a drug test;
 - All applicants are tested; and
 - A state-certified lab administers the test
- California law prohibits discrimination or adverse employment action based on (1) a person's cannabis use off the job and away from the workplace; or (2) drug test that found the person to have non-psychoactive cannabis metabolites
- Employers cannot ask applicant about cannabis use during the hiring process outside of certain positions which require testing. Examples of positions requiring substance testing:
 - Department of Transport-controlled positions (like Commercial Drivers License holders)
 - Workers transporting extremely dangerous materials (explosives, etc.)
 - School workers
 - Corrections and law enforcement officers

Employee Records

Keeping Medical Records Confidential: HIPAA

- Applies to health plans, healthcare clearinghouses, healthcare providers, and business associates
 - Must provide access notice to employees
 - Training on appropriate access and handling of medical records, appoint a privacy officer
 - Establish company policies and procedures, create sanctions for failure to comply
 - Form business associate agreements to uphold data privacy
- **Privacy Rule:** Purpose to ensure health information security and maintain it in confidence
 - Combination of identifying information (such as contact information) and medical information (such as a diagnosis) is protected
 - Keeping identifying information separate (e.g., in a separate data set) from medical information makes this identifying information not protected anymore
 - Authorization required from patient to use or disclose
 - Those with disabilities given increased privacy in records, must be kept separate from other files under ADA
- **Electronic Security Rule:** Purpose to ensure the security of PHI held or transmitted electronically
 - Burden placed on the covered entity and business associate to maintain security of the information
 - Information held in electronic form must be secured via encryption and/or active vigilance by an information security team

Keeping Personnel Records Confidential

- Civil Code Section 1798.82
 - Classes of information which must be protected:
 - Person's name and:
 - SSN
 - Driver's License information
 - Credit information
 - Medical information
 - Health insurance information
 - Must provide reasonable security of information and notice in event of data breach
- Labor Code Section 1198.5
 - Employees allowed access to their personnel records
 - Right to inspect and receive copies via written request, receive within 30 days
 - Employees also entitled to their payroll records under Labor Code section 226 and various IWC Orders

California Privacy Rights Act

California Privacy Rights Act

- California Consumer Privacy Act provided for protection of consumer data by allowing consumers to opt out of disclosure of data collected by companies
- Now, California Privacy Protection Agency has expanded these regulations to employers
- Changes from the CCPA:
 - Expanded definition of “sensitive personal information”
 - Employees given right to limit use of their information to the extent necessary to perform the services reasonably expected
 - Employees allowed to opt out of the sharing of their data with third parties
 - Employer must prepare and provide a privacy notice at or before the time that SPI is collected from them containing the names of all parties with current or future access to the information and notices from these third parties
 - Unless an exemption applies, employers must honor any employee requests to access, correct, limit the use of, delete, or otherwise control or manipulate the information
 - Employers must enter into Data Processing Agreements with any third parties who have access to the SPI they have collected, which dictate the terms governing the disclosure, use, or retention of the information involved
 - Failure to create or enforce DPA can generate significant liability for employer

Employee Privacy in the Workplace

Monitoring Employee Communications

- Electronic Communications Privacy Act
- Employees should have very little expectation of privacy as to their email and phone communications using company accounts; can listen/look in on business-related communications if valid business reason exists
- For similar reasons, an employer may also monitor internet traffic on company premises and/or using company internet services
- Some companies opt to create policies governing when emails are allowed to be monitored but these are not always legally binding
- NLRB recently gave employers back right to restrict employee use of work email, even for Section 7 purposes

Regarding Employee Dating Policies

- Generally, not allowed to promulgate these policies unless between supervisor and subordinate
- Labor Code Section 96(k)
 - Cannot take adverse actions against employees for engaging in lawful off-duty conduct
- However, employees can sue supervisor for sexual harassment if they view relationship between supervisor and other employee to be “sexual favoritism”
- Always wise to advise employees in relationships to talk to HR



Q & A

Thank you for joining us!

We'll see you next time.
Have a great day!

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