

Hiring in the Golden State:
Vetting Applicants
Breakout Four

California Strong 2017 Employment Law Conference

Presented by:
William Betley
Cassandra Secord

aa/rr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

Agenda

- Introduction
- Job Descriptions
- Applications & Resumes
- Interviews
- Background Checks
- Social Media
- Testing
- Conclusion

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What is a Job Description?

A Job Description typically consists of:

- A description of where the position falls within the company's organization chart
- Essential job functions
- Knowledge and critical skills
- Physical demands
- Environmental factors
- Any explanatory information that may be necessary to clarify job duties or responsibilities.

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Avoiding Discrimination – Title VII/FEHA

- Verify that selection criteria does not unlawfully discriminate against applicants.
 - Protected classes
 - Educational requirements
 - Physical fitness
 - Poor credit or criminal history
 - Citizenship or English fluency
 - Other factors

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Applications & Resumes

- Carefully Review Applications and Resumes
- Prohibited Inquiries
- Criminal Convictions
 - Juvenile convictions
 - Ban-the-Box Statutes
 - City of Los Angeles
 - City of San Francisco
 - Other Counties & Cities
- Electronic Applications

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Pre-Employment Interviews



- Valuable tool
- Avoid questions such as:
 - Do you have your own car?
 - Do you have childcare?
 - Are you planning to retire soon?
 - Have you ever been sick or injured on the job?
 - Are you a member of any social clubs or political organizations?

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Pre-Employment - References

- Legal Risks
- Verify dates of employment, job titles, and perhaps compensation
- Listen to tone of conversation for insights

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Pre-Employment – Background Checks

- Governing Law
 - FCRA
 - ICRAA
 - CCRAA
- Procedural Requirements
 - Written Disclosure
 - Employer Obligation to Provide Copy of Report
 - Authorization
 - Certification of Compliance
 - Pre- and Post-Adverse Action Notices

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Pre-Employment – Background Checks

- Penalties
 - Monetary Penalties
 - Punitive Damages
 - Attorneys' Fees and Costs
- Recent Class Action Settlements
 - *Reardon v. Closet Maid Corp.* (Case No. 2:08-cv-01730)
 - *Knights v. Publix Super Markets, Inc.* (Case No. 3:14-cv-00720)
 - *Singleton v. Domino's Pizza, LLC* (Case No. 8:11-cv-01823-DKC)

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Tips for Compliance

1. Be aware of employer's obligations under the FCRA, CCRAA, ICRAA, and any other applicable state law.
2. Do not combine FCRA, CCRAA, and ICRAA disclosures.
3. Do not combine disclosures and/or authorizations with employment applications, at-will acknowledgments, liability waivers, or other employment documents.
4. Prepare a separate authorization form to conduct a background check under the CCRAA and ICRAA.
5. Only conduct credit checks when allowed by Labor Code section 1024.5.
6. Follow proper procedures for taking adverse actions based on information obtained in background investigations, including pre-adverse action notice, statement of rights, copy of report, and post-adverse action notice.

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Social Media Searches



Exercise caution in conducting social media searches, employers run significant risk of uncovering protected information

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Avoid Discrimination and Other Claims

1. Never request an applicant's password or require an applicant to disclose a personal social media page (Labor Code § 980).
2. Delay viewing an applicant's social media profile until after an interview is conducted.
3. Refrain from singling out applicants for social media screening, and use the same criteria when researching each applicant on social media.
4. Separate the social media researcher from the decision-maker, shield the decision-maker from information that references a protected characteristic or activity.
5. Consider the source of the information when making a decision based on information contained in a social media profile—the social media profile may be outdated or not the applicant's posting.
6. Document the legitimate, non-discriminatory reasons to either offer or not offer employment.
7. Comply with background check laws.

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Drug Testing Applicants

Ensure procedural safeguards

Provide adequate notice

No obligation to accommodate employees use of marijuana

In CA, employers may require applicants to undergo post-offer, pre-employment drug testing

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Medical/Psychological Exams



- ADA/FEHA prohibit tests or selection criteria that screen out individuals with disabilities.
- After offer, employer can request testing if job-related and consistent with business necessity.
- Physical agility tests are not considered medical examinations.
- Personality tests come with potential legal problems.

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Putting It All Together

- Job Description
- Application (no criminal question if in a ban-the-box jurisdiction)
- Pre-Employment Interview
- Reference Checks (employment reference checks other than current employer, unless allowed by applicant)
- Credit Check (if allowed under California law) and/or Background Check (not including criminal if in ban-the-box jurisdiction)
- Conditional Offer upon passage of background check (if conducted after offer), criminal check, drug test, and/or medical exam

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Putting It All Together *continued*

- Criminal Check (in ban-the-box jurisdictions)
- Drug/Alcohol Test
- Medical Exam (if job-related, consistent with business necessity, and applied to all employees in the same job classification)
- Hire
- I-9 (within 72 hours of start date)

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**Question & Answer
Session**

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