

Taking Care of Business for 60 Years.

HR Basics

The Life of an Employee

Collette A. Hillier

Dave Morgan *of Morris & Garritano*

Kathryn M. Eppright



IS THE EMPLOYMENT DECISION YOU ARE ABOUT TO MAKE FAIR TO THAT EMPLOYEE, OTHER EMPLOYEES AND THE EMPLOYER?

Birth of an Employee Hiring Practices

- Want Ad: use non-discriminatory language
- At-will employees vs. contracts
- Interviewing: what not to ask in an interview
- Reference Checks: to Google or not to Google
- Rights to privacy laws
- Record retention

Review of the Basics

Which Laws Apply?

- Apply To All Employers
 - Child Labor Laws
 - State Disability Insurance
 - Employee Safety
 - Military Leave
 - Immigration Laws
 - Privacy Laws
 - Wage and Hour Laws
 - Worker’s Compensation
 - Posters, Pamphlets And Notices

Review of the Basics

Which Laws Apply?

- Two or more
 - All of the above
 - Cal COBRA
- Five or more
 - All of the above
 - California Anti-Discrimination Laws (DFEH)
 - Pregnancy Disability Laws
- Fifteen or more
 - All of the above
 - American's with Disabilities Act (ADA/ADAA)
 - Title VII Anti-Discrimination Act of 1964 (EEOC)
 - Genetic Information Non-Discrimination Act (GINA)

Review of the Basics

Which Laws Apply?

- Twenty or more
 - All of the above
 - Federal COBRA
 - Age Discrimination in Employment Act (ADEA)
- Twenty-five or more
 - All of the above
 - Military Spousal Leave
- Fifty or more
 - All of the above
 - Family Medical Leave Act (FMLA)
 - Mandatory Supervisor Sexual Harassment Training

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Ask yourself two questions before placing the ad:

- (1) Does the ad comply with Anti-Discrimination laws?
- (2) Does the ad imply a contract as opposed to an at-will employment relationship?

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Discrimination involves a personnel management action (like hiring, firing, promotion, job assignment) based on a discriminatory motive of a member of a **protected class**.

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Protected Classes:

- Race
- Color
- Religion
- National Origin
- Ancestry
- Physical or Mental Disability
- Medical Condition
- Marital Status
- Age (40+)
- Gender
- Sexual Orientation
- Retaliation (witness to or prior complainant of discrimination)

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- “50-unit apartment complex seeks experienced manager with general maintenance skills.”
- “Mid-size manufacturing company has opening for accountant with tax experience to oversee interstate accounts.”
- “Cook trainee position available in new vegetarian restaurant. Flexible hours.”



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Does The Advertisement Imply An Employment Contract?

- At-Will: no specified duration of guaranteed employment.
- Contract: guarantees employment for a specific term.

- At-Will: may be terminated for any reason, as long as it does not violate some other law.
- Contract: may only be terminated for good cause.

- At-Will: not liable for long term wage loss for wrongful termination.
- Contract: could be liable for damages for wrongful termination through the end of contract term.

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Applications:

Same Two Questions:

Discriminatory? Imply a Contract?

Avoid these problems by stating on the application:

- Any employment offered will be on a at-will basis
- A statement above the signature that states “Applicant warrants that all answers are truthful.”
- A statement that warns by signing the application, the applicant authorizes reference checks.
- An equal opportunity employer.

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PRIVACY ISSUES:

California Constitution

“All people by nature are free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and **privacy**.”

Birth of an Employee Hiring Practices

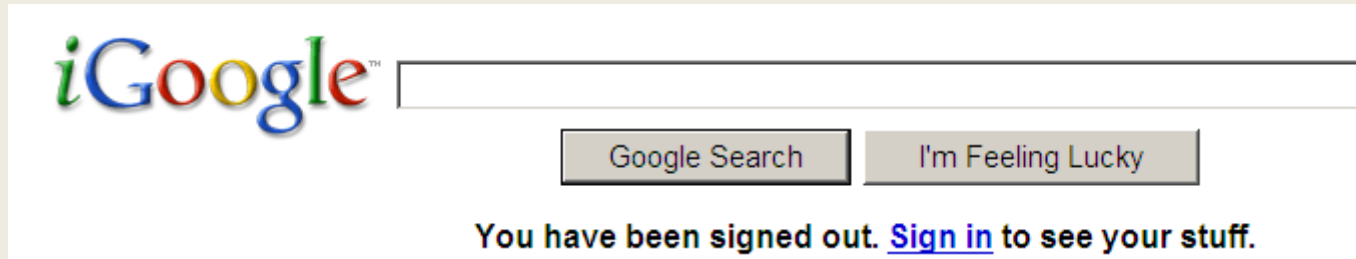
PRIVACY ISSUES:

White v. Davis (1975) 13 Cal.3d 757

The California Supreme Court said that the California Constitution's Privacy Provision is directed at

“the overly broad assemblage and retention of unnecessary personnel information by government and business, the improper use of information obtained for a specific purpose and the lack of a reasonable check on the accuracy of existing records.”

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To Google 😊 or Not to Google ☹️
That is the question.

Answer: Don't ask what you don't want to know.

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Arrest Records:

Must specifically exclude “all arrests for which a pre-trial diversion program was completed...any sealed, expunged, statutorily eradicated misdemeanors.”

And exclude all disclosure of minor drug offenses.

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Other things you might find out that you do not need to know:

- GINA
- Convictions
- Credit Information
- Public Records
- Drug/Alcohol Testing
- Psychological Testing and Honesty Assessment
- Shopping Investigations

Birth of an Employee Hiring Practices

Competing values in privacy issues in the
“social media” area:

- California Constitutional Right to Privacy
- First Amendment Right to Freedom of Expression
- First Amendment Right to Freedom of Association
- *Talley v. CA (1960) 362 U.S. 60*
 - held there is a right to anonymity in public expression

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Competing values in privacy issues in the
“social media” area:

- Things you learn as an employer are confidential.
- Before you intrude, is there a reasonable expectation of privacy?

Diary of a Dysfunctional Flight Attendant, by Ellen Simonetti
And other true stories

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Laws that attempt to deal with it all:

- Electronic Communications Privacy Act (ECPA)
 - Allows a civil action for “interception” of e-communication
 - *Konop v. Hawaiian Air*
- Stored Communications Act (SCA)
 - Public server shall not knowingly divulge the contents of any e-communications.
 - *Quon v. Arch Wireless*
- Computer Fraud Abuse Act (CFAA)
 - Both civil and criminal penalties for accessing information from a protected computer “without authorization.”

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Hernandez v. Hillside Children's Center

- The courts applied a reasonable expectation of privacy test in the workplace.
- The court held that under these circumstances there was no expectation of privacy.
- The court found that the expectation of privacy was outweighed by the legitimate business need.
- No actual invasion of privacy existed in this case because employees were never actually recorded.

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Government Code Section 12946:

“It shall be an unlawful practice for employers to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of two years **after the records and files are initially created or received**, or for employers to fail to retain personnel files of the applicants or terminated employees for a minimum period of two years after the date of the employment action taken.”

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Personnel Records Retention Policy

- Applications
- Job Description (hours of work)
- Reviews
- Counseling Records
- Reprimands
- Attendance Records
- Salary/Rate of Pay
- Benefits
- Receipt of Employee Handbook

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Employee Handbook

- Sexual harassment policy
- Anti-discrimination policy
- Record retention policy
- E-communication policy
- Absence policy
- Drug/Alcohol policy
- Description of personal or family leaves available
- Safety policy
- Termination policy

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After Termination Personnel File to Include:

- Termination notice
- Persons involved
- Disciplinary steps taken
- How was termination policy applied?
- Any written complaints from the employee
- List all employees supervised by same supervisor
- Employees discharged for the same reason(s)
- Investigation notes or reports
- Actions taken



IS THE EMPLOYMENT DECISION YOU ARE ABOUT TO MAKE FAIR TO THAT EMPLOYEE, OTHER EMPLOYEES AND THE EMPLOYER?

Life Happens

Leave of Absence

- California Occupational Safety & Health Administration
- Worker's Compensation
- State Disability Insurance
- Paid Family Leave (PFL)
- California Pregnancy Disability Leave (PDL)
- California Family Care and Medical Leave (CFRA)
- Family and Medical Leave Act (FMLA)
- Uniformed Services Employment & Reemployment Rights

Life Happens Leave of Absence

- California Occupational Safety & Health Administration
- Have a written and effective injury and illness prevention program
- certain high risk employers may be subject to high risk inspections
- be aware of hazards in the workplace
- conduct training on any hazards
- keep records of hazardous training
- notify CAL/OSHA of any serious injury or fatality within 8 hours (\$5,000 fine.)

Life Happens Leave of Absence

California Worker's Compensation Insurance - California Department of Industrial Relations

- Protects employees if injuries or illness occurs because of the job.
- Virtually every employer needs to carry WC Ins.
 - (i.e. Construction State Board licensing requires you to carry WC Inc. even with zero employee)
- Insurance for employee and employer

Life Happens Leave of Absence

State Disability Insurance (SDI) - California Employment Development Department (EDD)

- Partial wage replacement
- non-workplace injury, or
- Illness
- State plan - most employers pay into this and take an employee deduction
- Voluntary plan - large companies
- Elective Coverage - Employers and self-employed persons, including general partners may elect coverage.

Life Happens

Leave of Absence

- **PFL - Paid Family Leave**
- This is paid leave like State Disability Insurance to bond with a newborn or care for seriously ill parent, child, spouse *or registered domestic partner*. This provides pay, but not job security like FMLA, CFRA or PDL.

Life Happens Leave of Absence

- **PDL - Pregnancy Disability Leave (5+ employees) (Calif.)**
- PDL isn't paid time off, it's guaranteed time off for pregnancy and/or childbirth or related medical conditions. The employee may be eligible for less strenuous position if medically advisable. The guaranteed time off is for up to four months. It does not have to be continuous time, but as needed, the same as other disabilities.

Life Happens Leave of Absence

- **FMLA - Family Medical Leave Act (50+ employees w/in 75 mile radius)**
- This protects job entitlement; it is not an avenue for paid time off. Family is entitled to 12 weeks in a 12 month period of time for the birth of a child, adoption or placement of foster child, or for the employee's own serious health conditions, or to care for a spouse, parent or child.

Life Happens

Leave of Absence

- **CFRA - California Family Rights Act (50+employees)**
- Contains a similar guarantee of reinstatement of the same or comparable job as FMLA. *But it does not contain a military spouse leave or disability for pregnancy or pregnancy related conditions is not covered. (see PDL)*
The amount of leave time is less than under the federal FMLA, it is only 12 weeks for the birth, adoption, foster care placement, serious medical condition of the employee, their spouse, child or parent *or registered domestic partner (Calif. only not under FMLA).*

Life Happens Leave of Absence

- When is employee eligible for leave? Answer:
When employee is unable to perform job functions because of serious medical condition of self or family member.

Life Happens Leave of Absence

- You may required medical certification for an employee taking family leave. Contains the following:
- the date, if known, on which the serious health condition came into existence;
- the probable duration of the condition; and
- a statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his/her position.

Life Happens Leave of Absence

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Life Happens

Leave of Absence

- ADA/ADAA (over 15 employees) Federal Law
- DFEH (over 5 employees) California Law
- Both require employers to reasonably accommodate persons with disabilities.
- ADA a person is considered disabled if "substantially limited" in major life activities described in ADA.
- DFEH a person is considered disabled if "limited" in one or more "major life activities."
- Both require the **employee** to prove they are qualified individuals and that they can perform the essential job functions.

Life Happens

Leave of Absence

- Reasonable accommodation requirement: A modification or adjustment in a job, an employment practice or the work environment that allows an individual with a disability to enjoy an equal employment opportunity.
- Duty to timely engage in “interactive process.”

Life Happens

Leave of Absence

- Unpaid leave is a reasonable accommodation.
- part-time or work at home conditions are reasonable accommodations (if it does not impose an undue hardship on the employer)
- shift change
- location change
- department change
- irritant free environment

Autopsy of a Termination

- Dissection of a DFEH Complaint

DFEH web-site: http://www.dfeh.ca.gov/dfehIntake_eng.mpg

<http://www.dfeh.ca.gov/DFEH/Complaints/complaintProcess.aspx>

Mock DFEH Complaint:

[dfehcomplaint.pdf](#)

DFEH Response:

[DFEH response.pdf](#)

