

Critical Mistakes in Reasonable Suspicion Testing and Background Checks

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Overview

- Common mistakes employers are making
- Updates on background checks
- Recommendations for background check policies
- Drug testing in the workplace
- Reasonable suspicion basics
- Exercises

Common Mistakes

- Applying DOT requirements to non-DOT employees
- Ignoring state and local laws on background checks/drug testing
- Vague written policies
- Inconsistent consequences
- Failing to conduct reasonable suspicion tests immediately
- Supervisor training
- Overly broad post-accident/post-injury testing

Background Checks in California

- CA bans the box effective 1/1/2018
 - Remove “prior criminal history” questions from application and initial interview questions
- Amendment effective 1/1/2019 allows employers to ask applicants or any other source about criminal history in certain situations

Applicants: Prior Criminal History

- AB 1008 made it unlawful under FEHA for an employer to:
 - include on any employment application any question seeking disclosure of an applicant's criminal history,
 - to inquire into or consider the conviction history of an applicant before extending a conditional offer of employment, or
 - to consider or distribute specified criminal history information in conducting a conviction history background check (arrest without a conviction, an infraction, or a misdemeanor older than three years or felony older than seven years)

Applicants: Prior Criminal History

- Requires an employer that intends to deny a position solely or in part because of the applicant's prior conviction to conduct individual assessment of:
 - (a) the nature and gravity of the offense;
 - (b) the time that has passed since the offense and completion of any sentence; and
 - (c) the nature of the job held or sought.

Applicants: Prior Criminal History

- Then, the employer must notify the applicant of the reasons for the decision, provide the applicant at least 5 days to respond, and consider the response before making a final written employment decision.
- Employer must inform the applicant they may challenge the accuracy of the conviction history that is the basis for rescinding the offer, or submit evidence of rehabilitation or mitigating circumstances, or both.

Applicants: Prior Criminal History

- If an employer makes a final decision to deny an applicant in whole or in part upon prior conviction history, the employer must notify the employee in writing of the following:
 - (a) the final denial or disqualification;
 - (b) any existing procedure the employer has for the applicant to challenge this decision; and
 - (c) the right to file a complaint with the DFEH

Exclusions

- Four exceptions:
 - (1) for a position with a state or local agency required to conduct a conviction history background check;
 - (2) for a position with a criminal justice agency;
 - (3) for a position as a Farm Labor Contractor; and
 - (4) for a position where an employer or agent is required by state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history

Applicants: Criminal History (SB 1412)

SB 1412 amends Labor Code Section 432.7 and was enacted as a follow up to the Ban the Box legislation that went into effect in 2018. This new law allows employers to ask an applicant about or to seek from any source, information regarding a particular conviction under the following circumstances.

- (1) Employers are required to obtain information regarding the particular conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
- (2) The applicant would be required to possess or use a firearm in the course of his or her employment.

Applicants: Criminal History (SB 1412)

- (3) An individual with that particular conviction is prohibited by law from holding that position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
- (4) Employers are prohibited by law from hiring an applicant who has that particular conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

Updating Applications and Procedures

- Remove all requests for information related to prior salary history, including compensation and benefits, and criminal history from applications
- Ensure salary information for open positions is determined and ranges are available upon request
- Document when a conditional job offer is made, and request criminal history/performance conviction history background check
 - Exclude arrests, infractions, misdemeanors older than 3 years or felony older than 7 years
- Individualized assessment on impact and appeal process

Drug Testing

- CA Constitution protects employee right to privacy
 - Local ordinances provide further regulations and limitations
- Types of Testing
 - Pre-employment testing: an employer requires the job-seeker submit to a drug test prior to being placed on payroll.
 - Random testing: an employee may only be randomly drug tested IF they work in a position dealing with public safety.
 - Reasonable suspicion: if an employer has a reasonable suspicion of an employee using or abusing drugs or alcohol, then a court would likely uphold the validity and reason of an administered drug test.

Balancing Test

- CA Supreme Court ruled employer's justification for test must be weighed against employee's/applicant's right to privacy
- Employer must articulate an important need for test that justifies the intrusion
 - Pre-employment: applicant's expect less privacy during the application process because they are required to prove suitability for the position
 - Random: California courts upheld random testing for employees who perform safety-sensitive work because impairment could pose threat to employee/co-workers
 - Reasonable suspicion: employer must have suspicion employee is impaired based on relevant factors

HIPAA Implications

- Federal statutes (ADA, Drug-Free Workplace Act, Fair Credit Reporting Act, DOT) require employers to treat results confidentially
- Results may not be disclosed to third-parties unless required by law or court order (lawsuit, workers' comp case, criminal case)
- Employer policies should state who has access to result, employee should release results to employer
- HIPAA does not apply to employment records, unless the employee is a patient of the employer

Unemployment Eligibility

- Misconduct can justify termination and make ex-employee ineligible
- Termination for positive result?
- Refusal to submit to test?
- Evidence will be examined
 - Reasonable to require test?
 - Why did employer believe employee was intoxicated?
 - If terminated due to hangover, EDD requires prior warning
- Irresistible compulsion is not held against employee

Pre-Employment Testing

- Job description for safety-sensitive positions include a no drug clause
- Inform applicants that drug test will be required
- Written testing requirements for certain positions or classifications
- Zero tolerance drug policy
- Apply policy consistently
- Allow applicant disclosure of legal prescriptions related to disability prior to employment determination
- Reasonable accommodation may be necessary for some prescriptions

Random Testing

- Case law permits only for safety-sensitive work
- Not limited to only positions affecting public safety
- Must be triggered by a non-biased process to reduce likelihood employee is singled out
- Question: Would impairment pose a real threat of harm to employee himself or his co-workers?
- Reduce expectation of privacy and intrusiveness of procedure
 - Include drug-free clause in job description for these positions
 - Distribute testing policy to affected employees
 - Permit employee to explain positive results are based on legal use

Reasonable Suspicion Testing

- Employers should rely on objective criteria developed over time by medical professionals and regulators.
- To ensure suspicion is indeed reasonable, the employer should train management regarding the warning signs of drug use.
- When an employer lacks a bona fide reasonable suspicion of drug use, employees' privacy rights more likely will outweigh the employer's business interest in conducting a test.

What gives you reasonable suspicion?

- Supervisor must gather information that the company can rely on!
- Physical, behavioral, speech, performance, and odor signs and symptoms associated with intoxicants
- Physical appearance of various intoxicants
- Paraphernalia used to administer them
- This will not only help support a reasonable suspicion determination, but also adds credibility to assessment

Alcohol Intoxication Signs

- Lack of coordination
- Constricted pupils
- Blackout
- Bloodshot or watery eyes
- Sleepy or stuporous condition
- Aggressive or antagonistic behavior
- Slurred speech
- Slowed reaction rate
- Dulled mental processes

Marijuana Intoxication Signs

- Reddened, bloodshot eyes
- Lack of motivation
- Diminished concentration
- Impaired vision
- Slowed speech
- Chronic fatigue
- Irritating cough and chronic sore throat
- Pungent aroma, distinctive smell on clothing

Cocaine Intoxication Signs

- Talkativeness
- Wide mood and energy swings
- Profuse sweating/dry mouth
- Difficulty concentrating
- Paranoia and hallucinations
- Runny or irritated nose High blood pressure, heart palpitations
- Formication (sensation of bugs crawling on skin)
- Frequent non-business visitors, phone calls, delivered packages
frequent and extended absences from meeting or work assignment

Opiates Intoxication Signs

- Low, raspy speech
- Mood changes
- Physical fatigue and drowsiness
- Depression and apathy
- Impaired coordination
- Impaired mental functioning and alertness
- Dry mouth, facial itching
- Constricted pupils
- Impaired respiration
- Possible puncture marks ("tracks")
- Nausea, vomiting

Amphetamines Intoxication Signs

- Talkativeness
- Confusion
- Rapid respiration/profuse sweating
- Heightened aggressiveness
- Increased heart rate, blood pressure
- Hyperexcitability and restlessness
- Panic
- Dilated pupils
- Impulsive, risk-taking
- Runny/bleeding nose
- Redness in nasal are

Phencyclidine (PCP) Intoxication Signs

- Impaired coordination
- Incoherent
- Extreme mood shifts
- Violent and combative
- Incomplete or repetitive verbal responses
- Muscle rigidity
- Severe confusion and agitation
- Dilated pupils
- Nystagmus (spasmodic, involuntary jerky eye movement)
- Profuse sweating

Best practices in making determination

- Be confident, polite and respectful of the employee and confidentiality
- Give employee opportunity to explain. Expect denial.
- Be willing to waiver from your initial referral determination
- Recommend that you accompany employee to collection site
- Inform employee they are being removed from their position pending results
- Do not allow employee to drive to test on their own

Exercise 1

You have observed a bus driver on a bus while in service blowing smoke out of the driver's window. At the stop, you board the bus and smell the odor of marijuana. With passengers still on board, you immediately confront the driver and accuse him/her of smoking an illegal substance while on the job. You ask the driver to leave the bus and return to the bus yard for the remainder of his/her shift. After arranging for a substitute driver to take over the remainder of the route, you return to the bus yard and call the driver into your office where you advise him/her that they are being referred for a reasonable suspicion test, and that they must accompany you immediately to the collection site for testing. Startled by the operator's refusal to take the test, you inform them that their refusal is tantamount to a positive test result, and you are left with no choice but to remove them from driving detail and assign them to administrative duties until further notice. Upon hearing this, the operator suggests, and you readily agree to meet him/her at the test site first thing tomorrow morning.

Exercise 2

You have walked into the busy locker area and observed (via the concave mirrors) a tractor operator placing a needle and a vial into his/her locker. You decide that a reasonable suspicion referral is warranted and without explanation, you ask the operator to accompany you to your office. You proceed to tell him/her of your observation, and also that you have heard through the grapevine that he/she has been exhibiting signs which in your opinion, and based on personal experience, could be diagnosed as manic depression. You begin to ask the employee specific questions, the answers to which would either support or refute your assessment. You believe the employee's explanations and justifications to be honest and rational. Against your better judgment, but given that you have no tangible evidence, you end your discussion with a simple warning, and recommend treatment centers in the metropolitan area where help is available.

Exercise 3

While on your way home from work one evening, you observe an off-duty mechanic purchasing a white powdery substance packaged in a Ziploc bag from a well-known drug dealer. The next day you notice that her pupils are dilated, and that she is having difficulty using a screwdriver while performing maintenance on a 40-foot bus. You approach her in the work bay and inform her that you are making a reasonable suspicion determination and that she should accompany you to the collection site. As you expected, she vehemently denies these allegations and states that unless you are able to prove that she is on drugs, you have no right to request that she accompanies you anywhere. In a calm manner you explain that you sincerely hope to be proven wrong and that if she is "clean", then taking the test should not be a problem. She responds that you are in violation of her civil rights, throws down her tool belt and walks away. The following day, she reports to work still adamant about not taking the test, and threatens to take legal action against you and the company.

Rehabilitation Accommodation

- Employees who come forward seeking assistance voluntarily should be accommodated, if possible (Labor Code 1025)
- No obligation to offer rehab if employee requests assistance only after being caught
- If a second chance is offered, ensure the second chance complies with medical leave laws, ADA and FEHA
- Last Chance Agreements

Disclaimer

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

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