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A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JANUARY 2005

California employers must carefully assess whether they can use Megan's Law website information for employment purposes.

California Edition

A Littler Mendelson California-specific Newsletter

California's New Megan's Law Website: Employers Are Cautioned Not To Make Precipitous Employment Decisions

By: Rod M. Fliegel and Justin Curley

On December 15, 2004, California's new Megan's Law website was unveiled, allowing anyone with the click of a mouse to easily obtain access to California's database of the state's more than 63,000 registered sex offenders. The website was launched to help Californians better protect their families by becoming aware of the whereabouts of convicted sex offenders living in their communities. However, California law expressly prohibits the use of the state's sex offender registry information for employment purposes, except as otherwise provided by statute or to "protect a person at risk." Misuse of registry information is actionable and may expose the user to actual and exemplary damages, attorney's fees and a civil fine.

California employers are therefore cautioned to not make precipitous employment decisions based upon information obtained about a job applicant or current employee through California's Megan's Law website. A hasty decision to terminate an employee whose name is found on the Megan's Law website could lead to a claim for damages, a civil fine, and costly litigation expenses. California employers are not, however, entirely without recourse to protect their employees and customers from potential risks, as employers may continue to make lawful employment decisions based upon properly obtained criminal background checks and self-disclosed criminal history information.

Legal Background

Sex offenders living in California have been required by law since 1947 to register with their local law enforcement agencies. However, for nearly fifty years that information was not available to the general public. In 1994, California enacted a law establishing a "900" toll line telephone service to provide information regarding the identity of individuals convicted of sexual offenses against children. In 1996, with the passage of California's Megan's Law, the "900" toll line was expanded to provide information to the public concerning individuals who have been convicted of sexual offenses against adults as well as children. Additionally, California's Megan's Law required the California Department of Justice to produce and make available to the public at police stations a CD-ROM containing information on serious and high-risk sex offenders. Nonetheless, the Megan's Law sex offender database was not readily accessible for many Californians, and in 2004 California lagged behind over thirty states which had already made their states' Megan's Law databases available to the public on-line.

The California legislature therefore passed AB 488 on August 24, 2004, and Governor Schwarzenegger signed it into law on September 24, 2004. Codified as California Penal Code section 290.46, the statute requires the California Department of Justice to establish and regularly update a website which makes available to the public information contained in the state's sex offender registry. Information provided on the website includes the sex offender's name, aliases, age, gender, race, physical description, and, if available, a photograph. The website also includes a description of the criminal convictions that require the individual to register as a sex offender, and the county and zip code where the individual last registered. For the state's most serious offenders, the website provides a home address. Users may search the website by city, county, zip code, or individual name. They can also type in the name of a school or park in a community to locate sex offenders living in the nearby vicinity.

What Employers Should Know

Section 290.46(j)(2) expressly prohibits the use of information disclosed on the website for purposes relating to health insurance, insurance, loans, credit, *employment*, education, housing, or benefits, privileges, or services, provided by any business establishment. The statute provides that a user is authorized to use the website's information "only to protect a person at risk," who is defined by Penal Code section 290.45(a)(8) as a person who "is or may be exposed to a risk of becoming a victim of a sex offense committed by the offender."

California employers may understandably find themselves scratching their heads as to why this statute has the practical effect of making convicted sex offenders in certain respects a "protected class" of employees in California. However, section 290.46(j)(2) is not new; it is identical to a provision included in California's Megan's Law statute, section 290.4(e)(2), enacted into law in September of 1996. While no court has interpreted either of these provisions, a review of the legislative findings of California's Megan's Law statute offers a glimpse as to why these provisions were included:

> This policy of authorizing the release of necessary and relevant information about serious and high-risk sex offenders to members of the general public is a means of assuring public protection and *shall not be construed as punitive*… The Legislature also declares, however, that in making information available about certain sex offenders to the public, it *does not intend that the information be used to inflict retribution or additional punishment* on any such person convicted of a sexual offense. (Emphasis added.)

The California legislature was concerned with increasing community awareness about the whereabouts of convicted sex offenders, not precipitating additional public retribution or punishment beyond the sex offender's prison sentence. Had the statute been deemed a "punishment," it likely would have run afoul of state and federal constitutional prohibitions against ex post facto laws, that is, laws which inflict a punishment retroactively.

What Employers Can Do

Employers' hands are not, however, completely tied. The new statute does not prohibit employers from taking employment action based upon properly obtained criminal background checks and self-disclosed criminal history information. Thus, employers may make hiring decisions based on court records documenting a sex offense conviction or conviction information self-disclosed by an applicant during the hiring process.

As an initial matter, employers should evaluate to what extent, if any, they are regulated by section 290.46. The statute provides that its restrictions do not affect authorized access to, or use of, sex offender registry information by employers required by law or authorized to request summary criminal history information from the California Department of Justice.

Employers regulated by section 290.46 may ask whether there is a difference between sex offender registry information and conviction records. Registry information is now readily available at the Megan's Law website. Conviction records, on the other hand, are typically obtained by employers through a background check company. The distinction is highly material. When using a background check company, employers must comply with the fair credit reporting laws (e.g., obtain advance consent from the applicant, follow the prescribed "adverse action" procedures, etc.). Perhaps more importantly, background check companies in California may not report records of conviction (even felony convictions) that, from the date of disposition, release or parole, antedate the background check report by more than seven years. As a practical matter, this may lead to the bizarre result that an employer may not learn of an old sex offense conviction through the background check process, even though the name of the individual in question appears on the sex offender registry.

Employers may also obtain information concerning prior sex convictions by job applicants' self-disclosure. Employers should consider using job application forms that include a question asking if the applicant has ever been convicted of a felony offense. Additionally, employers should ensure their employees are properly trained to conduct effective interviews to elicit adequate information concerning prior convictions so that employers can make fully-informed hiring decisions. By obtaining this information through the hiring process, employers need not rely on (and should avoid consulting) the Megan's Law registry.

California employers can also expect to face a delicate situation: an employer may learn from the Megan's Law website that a current employee is registered as a convicted sex offender. An employer may learn of this information from the website directly (i.e., the employer personally accessed the website) or indirectly (i.e., the employer is notified by someone who accessed the website).

This situation presents a risk-tolerance issue for the employer: to avoid liability under section 290.46, the employer should evaluate any potential risk the employee may pose to fellow employees or customers before deciding to take an adverse employment action. The employer should make this evaluation considering all the facts and circumstances concerning the employee's work history at the company and the working environment. For example, if the employee works with or near children, or is an in-house service provider, an employer might be able to take action and be exempt from the statute's restrictions on use based upon the statute's provision permitting use of the website's information "to protect a person at risk." The purpose of the Megan's Law website would arguably be negated if employers could not take such action to protect children and other individuals who truly may be at risk.

In assessing potential risk, an employer should also evaluate the employee's work history at the company. For example, an employer may consider how long the employee has been at the company and what sort of employee he or she has been. Has the employee developed and maintained professional and productive relationships with his or her coworkers? Is the employee courteous and respectful of others? Answering these questions will enable an employer to better determine what level of risk, if any, the employee may present at the workplace.

An employer may wish to obtain further information to evaluate whether or not the employee poses an ongoing risk. In such a situation, an employer could meet with the employee privately to inquire as to when the conviction occurred, the circumstances surrounding the conviction, and if and to what extent the employee participated in a rehabilitation program. This information will help the employer to assess any risk the employee may present, and to determine if further action need be taken.

Employers should recognize that it is not clear from the plain language of the statute whether such a line of inquiry from an employer, prompted by information disclosed on the Megan's Law website, is permissible. However, the primary purpose of the website is to provide the public information to assess risks, and making an inquiry to assess a potential risk would seem perfectly appropriate. It seems unreasonable that a court would conclude an employer was compelled to do absolutely nothing when confronted with a potential risk to his or her employees and customers.

Conclusion

As discussed above, there are several steps employers can take to help ensure the safety of their employees and customers:

- Ensure the company has appropriate criminal history questions in its employment application and has implemented suitable policies and hiring guidelines.
- Train managers and supervisors to conduct effective interviews.
- Evaluate whether and how to use criminal background checks, ensuring compliance with the fair credit reporting laws, privacy laws, equal employment opportunities laws, and criminal and local laws.

Rod Fliegel is a shareholder in Littler Mendelson's San Francisco office. Mr. Fliegel represents clients in employment disputes, with an emphasis on disability discrimination issues, such as an employer's obligation to provide reasonable accommodation. Mr. Fliegel is an expert on the interplay between the disability discrimination laws and the Family/Medical Leave laws and California Workers' Compensation Act. He has extensive counseling experience in these areas of the law. Mr. Fliegel can be reached at rfliegel@littler.com

Justin Curley is an associate in the Littler Mendelson's San Francisco office. Mr. Curley represents and counsels management clients in connection with all types of labor and employment matters arising under federal and state law. Mr. Curley can be reached at jcurley@littler.com.