



JONES DAY
COMMENTARY

THE MEGAN'S LAW WEB SITE: CALIFORNIA EMPLOYERS BEWARE

Although it would seem logical to do so, an employer should think twice before using the Megan's Law web site when conducting background checks. The Megan's Law web site contains detailed information about convicted sex offenders in California who are required to register with local police authorities when they change their residences. See Cal. Penal Code § 290(b). It is maintained by the California Department of Justice and is available to anyone on the internet. See Cal. Penal Code § 290.46. It identifies each registered sex offender by name and address and also provides his/her criminal history and, usually, a photograph. This is very helpful information to any employer that wants to be sure it is not hiring or employing a convicted sex offender.

A conscientious employer seeking to hire an employee who will have face-to-face interaction with the public will want to check the Megan's Law web site to find out if a particular candidate is a convicted sex offender. After all, the California Legislature has declared that

sex offenders "pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." See Cal. Penal Code § 290.03. And it is perfectly permissible for an employer to decline to hire anyone who has been convicted of a crime. See, e.g., *Hetherington v. California State Personnel Bd.*, 82 Cal. App. 3d 582, 589 (1978); Cal. Lab. Code § 432.7. It also is unlawful for some employers, such as school districts, to hire convicted sex offenders, and at least some employers can be held liable for negligent hiring if they hire a sex offender for certain kinds of jobs. See, e.g., Cal. Educ. Code § 45122.1; *Virginia G. v. ABC Unified Sch. Dist.*, 15 Cal. App. 4th 1848, 1855 (1993); *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 843 (1992).

However, with certain exceptions, an employer may not use information disclosed on the Megan's Law web site for employment purposes. See Cal. Penal Code

§ 290.46(l). And the unauthorized use of such information exposes employers to liability for actual and exemplary damages, attorney's fees, and civil penalties of up to \$25,000. See Cal. Penal Code § 290.46(l)(4)(A).

The prohibition on use of the Megan's Law web site for employment purposes is subject to several exceptions, which are emphasized below:

(l)(1) A person is authorized to use information disclosed pursuant to this section **only to protect a person at risk**.

(2) Except as authorized under paragraph (1) **or any other provision of law**, use of any information that is disclosed pursuant to this section for purposes relating to any of the following is prohibited:

...

(E) Employment.

...

(3) *This section shall not affect authorized access to, or use of, information pursuant to, among other provisions, Sections 11105 and 11105.3, Sections 8808 of the Family Code, Sections 777.5 and 14409.2 of the Financial Code, Sections 1522.01 and 1596.871 of the Health and Safety Code, and Section 432.7 of the Labor Code.*

WHO IS "A PERSON AT RISK"?

The phrase "person at risk" is not defined in Penal Code section 290.46, and there is no case law defining "person at risk." The "Frequently Asked Questions" section of the Megan's Law web site warns against using information disclosed on the web site for purposes related to employment but sheds no light on who qualifies as a "person at risk." It says:

A person may use the information disclosed on the Attorney General's Web site only to protect a person at risk. It is a crime to use the information disclosed on the Attorney General's Internet Web site to commit a misdemeanor or felony. Unless the information is used to protect a person at risk, it is also prohibited to use any information that is disclosed pursuant to this Internet Web site for

a purpose relating to health insurance, insurance, loans, credit, employment, education, scholarships, fellowships, housing, accommodations, or benefits, privileges, or services provided by any business. Misuse of the information may make the user liable for money damages or an injunction against the misuse. Before using the information disclosed on this Web site, you may want to consult with an attorney or merely suggest to others that they view the Web site for themselves.

The legislative history does not directly address the question of who qualifies as a "person at risk." However, based on the legislative history of Penal Code section 290.4, it can be inferred that, at a minimum, a child would qualify as a "person at risk" for purposes of using the information disclosed on the Megan's Law web site in relation to employment. Specifically, Penal Code section 290.4 was enacted in 1994 as part of the "Child Protective Act of 1994." Section 290.4 required the California Department of Justice to operate a 900 phone line that members of the public could call to inquire whether a particular person was a registered sex offender. As originally enacted, Section 290.4 prohibited use of information disclosed on the 900 number for purposes related to employment except "to protect a *child* at risk." In 1996, Penal Code section 290.4 was amended to prohibit use of information disclosed on the 900 phone line except "to protect a *person* at risk." It can be inferred that the legislature meant to include adults in its definition of a "person at risk" through this amendment, but the legislative history is silent as to what adults would constitute a "person at risk."

It can also be inferred that children, patients at health care facilities, and adults who are physically handicapped, mentally impaired, or otherwise incompetent qualify as "person[s] at risk." In particular, Penal Code section 290.46(l)(3) lists several statutes that are not affected by the prohibition against certain uses of information on the Megan's Law web site. These include statutes that allow criminal background information to be used with respect to applicants for positions with supervisory or disciplinary power over minors (Cal. Penal Code § 11105.3); applicants for positions that involve regular access to patients at health care facilities (Cal. Lab. Code § 432.7); applicants for positions at child day care facilities (Cal. Health

& Safety Code § 1596.871); and potential clients of community care facilities that serve “the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children” (Cal. Health & Safety Code § 1522.01).

LABOR CODE SECTION 432.7

California employers routinely review the criminal records of job applicants. This is entirely lawful, except that they may not inquire about certain marijuana-related convictions. See Cal. Lab. Code §§ 432.7, 432.8. Penal Code section 290.46(l)(3) leaves this practice intact.

Labor Code section 432.7 prohibits employers from asking applicants about arrests that did not result in conviction, or from using such arrests as a factor “in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment.” Conversely, Labor Code section 432.7 allows employers to ask applicants about arrests that *did* result in conviction, or to use information concerning arrests that *did* result in conviction as a factor when making employment-related decisions, including hiring and firing.

Reading Penal Code section 290.46(l) and Labor Code section 432.7 together leads to a peculiar conclusion. So long as it learns about the sex offense from a source other than the Megan’s Law web site, *any* employer can use the fact that an applicant or employee was convicted of a sex offense as a factor when making employment decisions. However, an employer can base a hiring decision on information it obtains from the Megan’s Law web site only if it is “to protect a person at risk” or as authorized by some other law.

WHAT THIS MEANS FOR EMPLOYERS

By failing to inquire about an applicant’s criminal history, employers expose themselves to negligent hiring claims. *Evan F. v. United Methodist Church*, 8 Cal. App. 4th at 843. At the same time, by using the Megan’s Law web site to make employment-related decisions, employers face exposure to liability under Penal Code section 290.46.

While the law creates conflicting risks for employers, employers’ hands are not tied. Employers can:

- **Use the Megan’s Law web site to protect persons at risk or as authorized by other laws.** Employers that operate facilities such as schools, day care centers, hospitals, and other businesses that involve exposure to children and other individuals who might be vulnerable to sexual predators can make employment-related decisions based on information discovered on the Megan’s law web site. Indeed, many employers are subject to laws and regulations that prohibit them from hiring convicted sex offenders altogether. See, e.g., Cal. Educ. Code § 45122.1 (prohibiting school districts from hiring persons convicted of violent or serious felonies, including sex offenses).
- **Ask applicants and employees to voluntarily disclose whether they have been convicted of sex offenses.** Employers are free to ask applicants to disclose whether they have been convicted of any crimes (except certain marijuana-related convictions). See Cal. Lab. Code § 432.7. Employers are not prohibited from taking employment action based on an applicant’s or employee’s voluntary disclosure that he or she is a convicted sex offender.
- **Use other sources to determine if applicants or employees have been convicted of sex offenses.** Although the Megan’s Law web site makes it easy to learn whether an applicant or employee is a convicted sex offender, the web site is not the sole source of that information. Employers can use other, more traditional means, such as searching court records, to find out whether an applicant or employee is a convicted sex offender. While this method is more costly than simply checking the Megan’s Law web site, many employers already use background check companies to perform such searches. However, employers should exercise caution when using background check companies, as an employer cannot insulate itself from liability by relying on information provided by a background check company. Before using a background check company, employers should be knowledgeable about the background check company’s source of its information.

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