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Drug Testing and Background Checks – Employment Law Considerations for Criminal Attorneys

Presented to the North Orange County Bar Association

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Nisha is a Partner in Dorsey's Labor and Employment Group. Nisha has a depth of experience in the most challenging issues employers face today, including sexual harassment or other sensitive investigations, employment terminations and severance negotiations, confidentiality, non-disparagement, and trade secret protections and limitations under state law, paid sick leave, kin care, and paid time off regulations, background check and drug testing requirements, regulatory filings including EEO-1, pay data, and affirmative action reports, leaves of absence including maternity and paternity leave, layoffs and closures, and other complex matters.

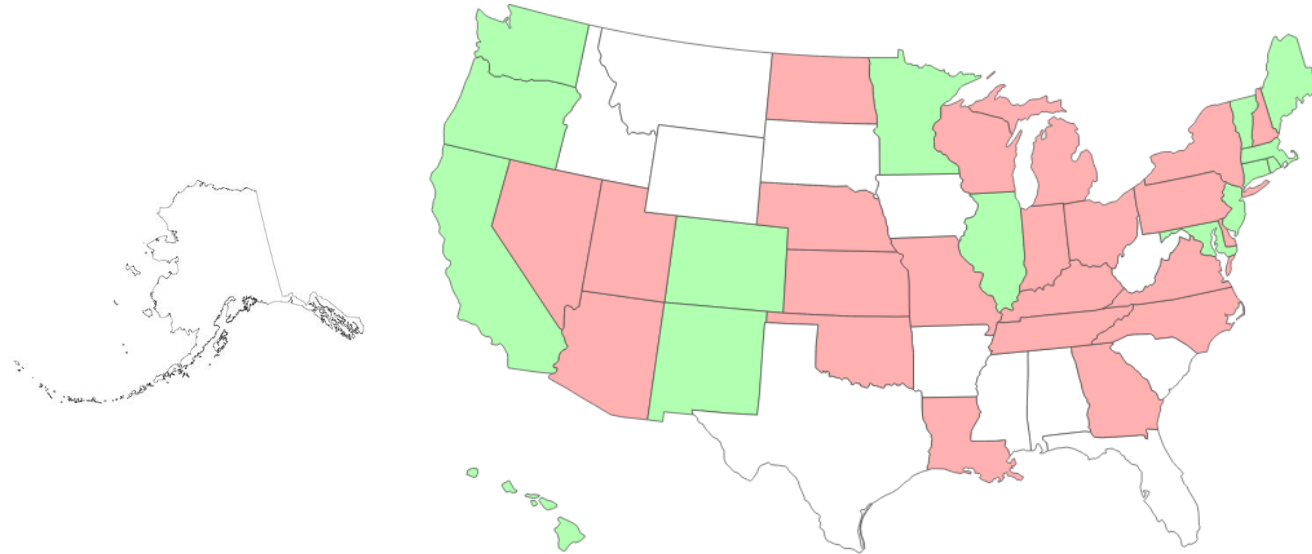
Nisha has managed all aspects of union relations for employers, including organizing campaigns, representation petitions and related objections, unfair labor practice and other proceedings before the National Labor Relations Board, grievance administration and labor arbitrations, collective bargaining agreement negotiations and implementation, labor management meetings, picketing and strike mobilization, and other critical labor matters.

Nisha is a seasoned litigator who has obtained results for clients through trial, arbitration, dispositive motions, and mediation. She handles a wide variety of litigation including single-plaintiff actions and contractual disputes, but specializes in managing complex wage and hour class actions and representative actions under the Private Attorneys General Act of 2004 (PAGA), including matters relating to the effect of arbitration agreements on these claims. In every case, Nisha conducts a thorough and in-depth evaluation early on and presents her clients with the full range of possible strategy options in order to ensure the litigation is handled in the most efficient and cost-effective manner.

Prior to re-joining Dorsey, Nisha served as Senior Legal Counsel at a multistate healthcare employer, where she implemented solutions to wide array of labor and employment matters, handled healthcare and government contract negotiation and dispute resolution, and obtained certifications as a compliance and privacy officer.

BACKGROUND CHECKS

“Ban-the-Box” Laws



Red: Public sector
Green: Public sector + private sector

Covers 267 million people in the United States

By 2021: Public-sector employment ban-the-box laws adopted by 37 states, District of Columbia, and approximately 150 cities and counties

By 2021: Private-sector employment ban-the-box laws adopted by 15 states and 22 cities and counties

California's "Ban the Box"

Starting in 2018, employers were prohibited from:

- Asking for criminal history on applications
- Inquiring into criminal history during interview or anytime before "conditional offer of employment" is made

Once conditional offer of employment is made:

- Must make "individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position"

(Gov. Code 12952)

Individualized Assessment

Must consider:

- The nature and gravity of the offense or conduct
- The time that has passed since the offense or conduct and completion of the sentence
- The nature of the job held or sought

Must also provide notice:

- With copy of conviction report, informing them of the opportunity to respond
- Then, if final decision not to hire is made, notice of final decision

Example of “Individualized Assessment” Matrix

Convicted Offenses <u>Note, this list is not exhaustive. If there are offenses in a prospective applicant’s history that are not listed below, please contact Legal.</u>	61-84 months since disposition Felonies = Automatic PA-FI or Higher 1 – NPA = No Pre-Adverse 2 – PA-FI = Pre Adverse, Further Inquiry 3 – PA-LD = Pre Adverse, Likely Disqualified	25-60 months since disposition Felonies = Automatic PA-FI or Higher 1 – NPA = No Pre-Adverse 2 – PA-FI = Pre Adverse, Further Inquiry 3 – PA-LD = Pre Adverse, Likely Disqualified	0-24 months since disposition Felonies = Automatic PA-FI or Higher 1 – NPA = No Pre-Adverse 2 – PA-FI = Pre Adverse, Further Inquiry 3 – PA-LD = Pre Adverse, Likely Disqualified
Assault /Battery – Other Victims	PA-LD	PA-LD	PA-LD
Assault/Battery – Domestic Violence	PA-FI	PA-FI	PA-LD
Bad Check	NPA	PA-FI	PA-FI
Burglary	PA-LD	PA-LD	PA-LD
Car Jacking	PA-LD	PA-LD	PA-LD

Prohibited Inquiries – California

There are some categories of records that employers cannot “utilize, as a factor in determining any condition of employment including hiring, promotion, termination” (even after a conditional offer):

- Arrests or detentions *not* resulting in conviction
- Referral to or participation in a pre-trial or post-trial criminal diversion program
- Marijuana possession offenses more than two years old
- Convictions that have been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.425, 1203.45, and 1210.1 of the Penal Code. (*Lab. Code 432.7*)

“This section shall not prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on their own recognizance pending trial.”

There exist certain exceptions where the above records are required by law. A 2019 amendment narrowed those exception to ensure review of criminal records only where absolutely necessary

Prohibited Inquiries – California

- Juvenile criminal history
- Arrests or convictions that are more than 7 years old
- Bankruptcies that took place more than 10 years ago
- Debts that are more than 7 years old

(Cal. Civ. Code § 1786.18)

Prohibited Inquiries – California

SB 731, effective July 1, 2023

- Most felony records are sealed if defendant completed their sentence probation, supervision, parole and any other terms of conviction and are not convicted of a new felony for four years
- Exceptions for violent or serious felonies
- Background check vendors should ensure sealed records are not visible to employers, but employers should consider when reviewing background checks.

Notice and Authorization Required for All Background Checks

- Investigative Consumer Reporting Agencies Act (ICRAA) governs background reports bearing on “character, general reputation, personal characteristics, or mode of living [which are] obtained through *any* means” (Cal. Civ. Code 1786.16)
- The Federal Fair Credit and Reporting Act (FCRA) imposes similar limitations
 - Notice of the purpose of the background check is required (must be a separate document)
 - In 2018, California Supreme Court reinforced strict rule requiring *written authorization* for reports
 - The applicant/employee has a right to request a copy
 - The applicant has the right to notice before an adverse action is taken, and the right to response, similar to “ban the box” process described above

Background Checks During Employment

Notice and authorization under the ICRAA must be provided for all background checks, even *after* starting employment.

- There are limited exceptions:
 - An ongoing investigation based on “suspicion of wrongdoing or misconduct by the subject of the investigation”
 - Requirements of state regulatory requirements (i.e., CA DMV MVR reports)

Credit Checks – FCRA and CCRAA

Credit reports limited to specific positions (examples: exempt managers, law enforcement, financial institutions)

If report allowed:

- Clear and conspicuous written disclosure
- Allow employee to receive copy of the report
- Provide notice before taking adverse action based on report, and after adverse action taken (Lab. Code 1024.5; Civ. Code 1785.1)

Foundational Principal

- Employment by a private employer in California is “at-will”, meaning either the employer or the employee can end the relationship for any reason, or for no reason at all, without notice
- Exceptions
 - Unionized employees subject to collective bargaining agreements that impose a “just cause” standard, in which case the union would bring the case to grievance and arbitration
 - Employees with employment agreements that set out a “for cause” standard, in which case the remedy is usually some amount of severance
 - “Any reason” means any “legal reason;” terminations that are discriminatory due to protected characteristic, or retaliatory based on protected activity, are actionable

Employment Decisions Based on a Conviction

– Current Employees

- “Ban the Box” addressed above covers the analysis for job applicants.
- For current employees, once the employer has legally confirmed the conviction, there is a further analysis.
- Employers should make employment decisions based on the conviction if it makes the employee unfit for the position, according to Equal Employment Opportunity Commission (EEOC) guidance released in 2012.
- The question is whether the conviction is job related and consistent with business necessity

Question

1. If an employee is charged, but not yet convicted, of a crime, can his employer lawfully terminate employment?
2. If, after several months, the employee pleads guilty and is convicted, can his employer lawfully terminate employment?

Example 1: Jimmy

- Jimmy works at a warehouse for a big box retailer, and has been in his current position for three years.
- He is arrested for domestic violence following an altercation with his spouse. The arrest occurs on a Sunday, and Jimmy is not released from on bail until Tuesday. He called out of work Monday and Tuesday, without giving a specific reason.
- Jimmy's employer has a "no fault" attendance policy that allows a last-minute call-offs to a certain threshold, which Jimmy has not met.
- Jimmy's manager heard a rumor from another employee that Jimmy was in jail, but did not hear anything as to why.
- Jimmy's wife does not work for the big box retailer.

Example 1: Jimmy

1. Can Jimmy's employer conduct a third-party background check on him without his permission?
2. Can Jimmy's employer ask him about the arrest?
3. Would the background check vendor properly be able to report the arrest?
4. Can Jimmy's employer take adverse action on him based on the arrest?
5. Would it matter if Jimmy's absences exceeded the threshold under the policy?

Example 2: Jane

- Jane works as a graphic designer for an e-commerce website. Her job is fully remote, and does not require interface with customers.
- The website publicly expresses its support for the LGBTQ community and manufactures and markets several products to celebrate Pride Month.
- After work, Jane attends a school board meeting as part of a group advocating to remove a textbook referencing a gay historical figure from state-required curriculum.
- At the school board meeting, Jane gets into an altercation with a parent with an opposing viewpoint and is arrested.
- Jane's arrest, but not the altercation, are captured on the evening news. The CEO of her company sees it, but does not take action right away.
- Jane ultimately pleads guilty and has a conviction on her record.

Example 2 – Jane

1. Can Jane's employer conduct a third-party background check on her without her permission?
2. Can the background check company properly report the conviction?
3. Can Jane's employer take adverse action against her based on the conviction?
4. Would it matter if Jane was in public relations for her company? Would it matter if she was in procurement and worked with suppliers?

“Lawful” Off Duty Conduct

Labor Code 96(k)

- Section 96(k) of the Labor Code, gives the California Labor Commissioner jurisdiction to investigate and seek remedies on behalf of any employee who is denied wages as a result of engaging in “lawful off-duty conduct.
- Section 98.6(b)(1) of the California Labor Code states that if an employee is terminated for engaging in lawful off-duty conduct protected by section 96(k) he/she is entitled to reinstatement and reimbursement for lost wages.
- While rarely litigated, the standard with respect to an employment decision will likely be based on whether the employer can establish a “legitimate, non-retaliatory reason” for the termination, which standard should be met based on the employer’s good faith belief that the conduct was unlawful, even if the employee is later acquitted

Protection for Political Speech

Labor Code 1101

Labor Code 1101 provides: “No employer shall make, adopt, or enforce any rule, regulation, or policy:

- (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office;
- (b) Controlling, directing, or tending to control or direct the political activities or affiliations of employees.”

DRUG TESTING

Background

Employer drug testing dates back to the Vietnam War, when President Richard M. Nixon asked the military to start a urine-testing program for returning service members

Employer drug testing for marijuana is declining while use is increasing

- Quest Diagnostics Drug Testing Index: 3.9% marijuana positivity rate in general workforce in 2021; 4.3% marijuana positivity rate in general workforce in 2022
- Doesn't mean employees high on the job

THC vs. Nonpsychoactive cannabis metabolite

- THC: chemical compound found in cannabis that can indicate impairment; “high”
- NCM: after cannabis is metabolized by the body that does not indicate impairment

Employers abandoning

- Amazon.com, AutoNation, Inc., Caesars Entertainment, Inc., NBA

Employer Drug Testing

When permitted in California :

- Pre-employment screening – when applied to all applicants
- Physical exams which are otherwise permitted under state and federal law, subject to limitations
- “Reasonable suspicion” and “post-accident”
- Random drug testing is permitted in very limited circumstances

Drug Testing and Prescription Drugs

Use of other prescription drugs will still trigger ADA/FEHA considerations

In 2018, EEOC prevailed in cases arguing employees were improperly terminated for prescription drug use

Balancing act:

- EEOC enforcement guidance suggests employer should not require disclosure of prescription drug use
- But employers need a mechanism to except employees taking prescription drugs for a disability from drug testing policy
- Requirements to provide reasonable accommodation and engage in the interactive process still apply

Legalizing Recreational Marijuana

- Colorado and Washington were the first to legalize recreational marijuana in 2012
- Now recreational marijuana is legal in some way in 22 other states, plus Washington, D.C. and Guam
- In states that have legalized, it is usually for people age 21 and older
- Employers not required to allow use, consumption, possession, etc. at the workplace
- Marijuana remains illegal at the federal level

California – No More “Traditional” Testing for Marijuana

Signed by Governor Newsom on September 18, 2022; does not take effect until January 1, 2024; Cal. Gov’t Code § 12954

Employers will be prohibited from discriminating against applicants and employees based on drug tests results that reveal the presence of nonpsychoactive cannabis metabolite

- Hiring, termination, any term or condition of employment, or any penalty

Rationale is that while such tests may reveal prior use of cannabis (i.e. in hair, blood, urine, or other bodily fluids), the tests do not reveal whether a person is *currently* impaired or under the influence of cannabis

- In other words, if employers are going to test, they have to use more expensive test that reveal person is currently impaired or under the influence of cannabis

California – No More “Traditional” Testing for Marijuana (con’t)

- Law does not apply to the building and construction trades or positions that require a federal government background investigation or security clearance in accordance with federal laws and agencies
- Employers may still maintain drug- and alcohol-free workplace, as specified in Section 11362.45 of the California Health and Safety Code and any other rights or obligations of an employer specified by federal law or regulation
- Employers can still prohibit employees from possessing, to be impaired by, or to use, cannabis on the job
- San Francisco has its own rules regarding testing of employees

Washington – Also Banning “Traditional” Testing for Marijuana

Signed by Governor May 9, 2023; effective January 1, 2024

Employers prohibited from discriminating against an applicant because of the person’s use of marijuana off the job or as the result of a drug test that revealed nonpsychoactive cannabis metabolites in the applicant’s hair, blood, urine, or other bodily fluids

- Employer can still test for cannabis as long as results are not reported to the employer

Employers permitted to test applicants using methods that do not screen for nonpsychoactive cannabis metabolites

Employers may still maintain drug and alcohol free workplace, conduct reasonable suspicion testing

Exceptions for certain industries

Legalizing Recreational Marijuana – Less Strict Requirements for Employers

Alaska, Arizona, Colorado, Delaware, Maine, Massachusetts, Michigan, Missouri, New Mexico, Oregon, Washington

- Employers can take adverse employment actions

Maryland

- Allows recreational use but has no specific law related to drug testing by employers

Washington, D.C.

- Limits the amount a person can legally possess employers still allowed to impose restrictions

Hawaii, Idaho, New Hampshire, North Dakota, Ohio, Vermont

- Not recreationally legal, but creates minimum amount a person must possess in order to be charged with a crime

Legalizing Recreational Marijuana – Stricter Requirements for Employers

Connecticut

- Employers cannot take adverse action against an employee for recreational marijuana use outside of the workplace unless they have a disseminated policy; employers cannot take adverse action against a potential employee based on recreational marijuana use outside of the workplace (including positive test results for certain strains) prior to hire unless doing so would violate federal contract or lose federal funding

Illinois

- Employers cannot take adverse action against an employee or potential employee for use of lawful substance off employers' premises during non-working hours; employers that do reasonable suspicion testing have to demonstrate the employee exhibited certain enumerated symptoms

Legalizing Recreational Marijuana – Stricter Requirements for Employers (con't)

Montana, Rhode Island

- Employers cannot take adverse action against an employee or potential employee for use of lawful substance off employers' premises during non-working hours (with several exceptions)

Nevada

- Employers cannot refuse to hire an applicant because of the presence of marijuana on a drug test (with exceptions)

New Jersey

- Employers cannot take adverse action against applicant or employee because of the use of marijuana or presence of marijuana on a drug test unless failing to do so would violate a federal contract
- Employers still permitted to maintain a drug-free workplace

Legalizing Recreational Marijuana – Stricter Requirements for Employers (con't)

New York

- Similar to New Jersey law; but employers cannot test for the presence of recreational marijuana unless explicitly authorized by N.Y. Lab. Law § 201-d(4-a)
- New York City: employers may not test applicants for marijuana as a condition of employment (similar ordinance in Philadelphia, Pennsylvania, though no state law)

Virginia

- Possession of up to 1 once legal for those over 21
- No state law, but employers can not require applicants to disclose simple marijuana-related arrests, charges, or convictions during interview or hiring process

Minnesota – Changes to Drug and Alcohol Testing in the Workplace Act (DATWA) and Consumable Products Act (CPA)

- Legalized edible products last year but did not change DATWA or CPA
- Legalized recreational use of marijuana this year, including amendments to DATWA and CPA
- Exemptions: peace officers and firefighters; positions where impairment would threaten a person's health or safety; positions within the health care, child care, education, and social work industries requiring interaction with patients, children, or vulnerable adults; positions created by federal grant, regulated by the DOT, contracted by the federal government, or otherwise governed by federal drug testing requirements.

Minnesota – Changes to Drug and Alcohol Testing in the Workplace Act (DATWA) and Consumable Products Act (CPA) (con't)

- Employers can no longer screen applicants for marijuana use as a condition of employment (unless otherwise required by state or federal law)
- Employers cannot discriminate against an applicant based on positive test for marijuana
- Employers can still screen for marijuana as part of random drug testing for current employees
- Employers allowed to prohibit the use, possession, or distribution of cannabis products, including medical marijuana, while working or on work premises
- Employers allows to test for marijuana as part of reasonable suspicion testing

Legal Notice

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Questions?