

Employment Law 101 – And Developing Issues



Presented by:

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At-Will Doctrine

- What does it mean?

- **Forget at-will!**

Hiring Issues: Social Networking, Internet, Background Checks and Related Issues

Employment Screening Tool?

- Some employers now search Google as part of their regular background checks for applicants
- Looking for red flags
 - Attitudes/behaviors that do not mesh well with employer's core values, portend misbehavior, or pose potential liability for employer



Employment Screening Tool?

- **Caution** – Risk May Outweigh Possible Gain
 - Savvy user will set privacy settings to restrict access to information
 - Facebook/MySpace profile indicates race, religion, disability, sexual orientation or other protected categories of candidate
 - Important defense for failure to hire claim is actual ignorance of protected characteristic

Avoiding the Pitfalls

- Consider:
 - Have HR check internet (not hiring manager)
 - Obtaining written consent before searching Internet or social networking sites
 - If search reveals information that played a part in not hiring, keep copy of information and consider giving candidate opportunity to address the information
 - Be consistent - if you check any, check all candidates

NLRB Protections

- If employees are discussing terms and/or conditions of employment, e.g. wages, discipline may be inappropriate in certain circumstances as the employees may be engaging in protected activity.
- The NLRB is watching!



Identifying Problem Employees

- 95% of employee problems are caused by 5% of the employees
- Cost of hiring problem employee



The Employment Application

1. **Use a Comprehensive Application**
2. **Have Every Applicant Complete an Application**



3. **Examine the Application Carefully**
 - Prior terminations
 - Reasons for leaving prior jobs
 - Declining wages
 - Lack of personal references
 - Question about criminal convictions left blank
 - Gaps in employment history
 - “Victim-like” responses to question of why they left prior jobs
 - Failure to sign the application

APPLICATION FOR EMPLOYMENT

Position Desired: Whatever Part time Full time Date 9-4-01

Name (Print) Myside Thorn N.
Last First Middle

Present Address 7104 E. 79th, Fullerton, CA How long have you lived there? 9
Street and Number City State Zip Code Years Months

Previous Address 230 E 15th, Los Angeles, CA How long did you live there? 6
Street and Number City State Zip Code Years Months

Telephone No. 714-923-8100 Social Security No. 912-548-9504

Have you ever worked for this Company before? Yes No
 If Yes, please give dates and position:

Have you ever pled guilty or "no contest" to, or been convicted of, a misdemeanor or felony? Yes No
 If Yes, please give the date(s) and details:

Have you been arrested for any matters for which you are out on bail or on your own recognizance pending trial?
 Yes No
 If Yes, please give the date(s) and details:

NOTE: Answering "Yes" to these questions does not constitute an automatic bar to employment. Factors such as age and time of the offense, seriousness and nature of the violation, and rehabilitation will be taken into account. Do not include minor traffic infractions, and convictions for which the record has been sealed or expunged, any conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed, referrals to and participation in any pretrial or posttrial diversion programs, and marijuana-related offenses that occurred over two years ago in answering these questions.

RECORD OF PREVIOUS EMPLOYMENT

Please list the names of your present or previous employers in chronological order with present or last employer listed first. Be sure to account for all periods of time including military service and any period of unemployment. If self-employed, give firm name and supply business references. [Add additional page if necessary]

Present or Last Employer	Employed From (mo/yr) To (mo/yr)	Pay Start \$ To \$	Your Title or Position	Exact Reason for Leaving
<u>FAT & FINK</u> Address <u>34 W. 105th</u> City, State, Zip Code <u>San Diego, CA</u> Telephone <u>619-345-1278</u>	<u>12/00</u> Present	<u>7.00</u> <u>7.50</u>	<u>Purchasing Agent</u> Name and Title of Last Supervisor <u>Fred Fink</u>	<u>Poor working conditions</u>
<u>CHEATUM & BEATUM</u> Address <u>3214 W. 3rd</u> City, State, Zip Code <u>Los Angeles, CA 90324</u> Telephone <u>213-468-1298</u>	<u>11/99</u> <u>2/00</u>	<u>6.50</u> <u>7.00</u>	<u>Helped Buyer</u> Name and Title of Last Supervisor <u>Buyer</u>	<u>Disagreed with policy</u>
<u>DULL & DULLER</u> Address <u>37 52nd Street</u> City, State, Zip Code <u>Buffalo, NY</u> Telephone <u>4199</u>	<u>2/99</u> <u>4/99</u>	<u>9.00</u> <u>10.25</u>	<u>Helped VP</u> Name and Title of Last Supervisor <u>John Dork</u>	<u>Mutual Agreement</u>

No Criminal Record

Reasons for leaving

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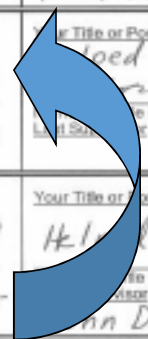
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Present or Last Employer	Employed From (mo/yr)	Pay Start	Your Title or Position	Exact Reason for Leaving
FAT & FINK Address: <u>34 W. 105th</u> City, State, Zip Code: <u>San Diego, CA</u> Telephone: <u>619-345-1278</u>	<u>12/00</u> To (mo/yr): <u>Present</u>	Start \$ <u>7.00</u> Final \$ <u>7.50</u>	<u>Purchasing Agent</u> Name and Title of Last Supervisor: <u>Fred Fink</u>	<u>Poor working conditions</u>
CHEATUM & BERGMAN Address: <u>3214 W. 3rd</u> City, State, Zip Code: <u>Los Angeles, CA</u> Telephone: <u>213-468-1298</u>	<u>11/99</u> To (mo/yr): <u>2/00</u>	Start \$ <u>6.50</u> Final \$ <u>7.00</u>	<u>Used Buyer</u>	<u>Disagreed with policy</u>
DULL & DULLER Address: <u>32 52nd Street</u> City, State, Zip Code: <u>Queens, NY</u> Telephone: <u>718-277-1010</u>	<u>2/99</u> To (mo/yr): <u>4/99</u>	Start \$ <u>9.00</u> Final \$ <u>10.25</u>	<u>HR VP</u> Name and Title of Last Supervisor: <u>Ann Dork</u>	<u>Mutual Agreement</u>



Gaps

Lower Pay

CAUTION

EDUCATION

School Name	Years Completed (Circle)	Diploma/Degree	Describe Course of Study or Major	Describe Specialized Training, Experience, Skills and Extra-Curricular Activities
Elementary:	4 5 6 7 8			
High School:	9 10 11 12			
College/University:	1 2 3 4			
Graduate/Professional:	1 2 3 4			
Trade or Correspondence:				
Other:				

See Resume

PERSONAL REFERENCES

Please list persons who know you well – not previous employers or relatives

Name	Occupation	Address (Street, City and State)	Telephone Number	Number of Years Known
Jeffrey Dolmer	Metal worker	Cell Block 31	N/A	9
Jim Clark	Psych.	Postal Service		

THIS APPLICATION WILL BE CONSIDERED ACTIVE FOR A MAXIMUM OF THIRTY (30) DAYS. IF YOU WISH TO BE CONSIDERED FOR EMPLOYMENT AFTER THAT TIME, YOU MUST REAPPLY.

I CERTIFY THAT ALL OF THE INFORMATION THAT I HAVE PROVIDED ON THIS APPLICATION IS TRUE AND ACCURATE.

Date

Signature of Applicant

Warning

Failed to Sign

Top Resume Remarks

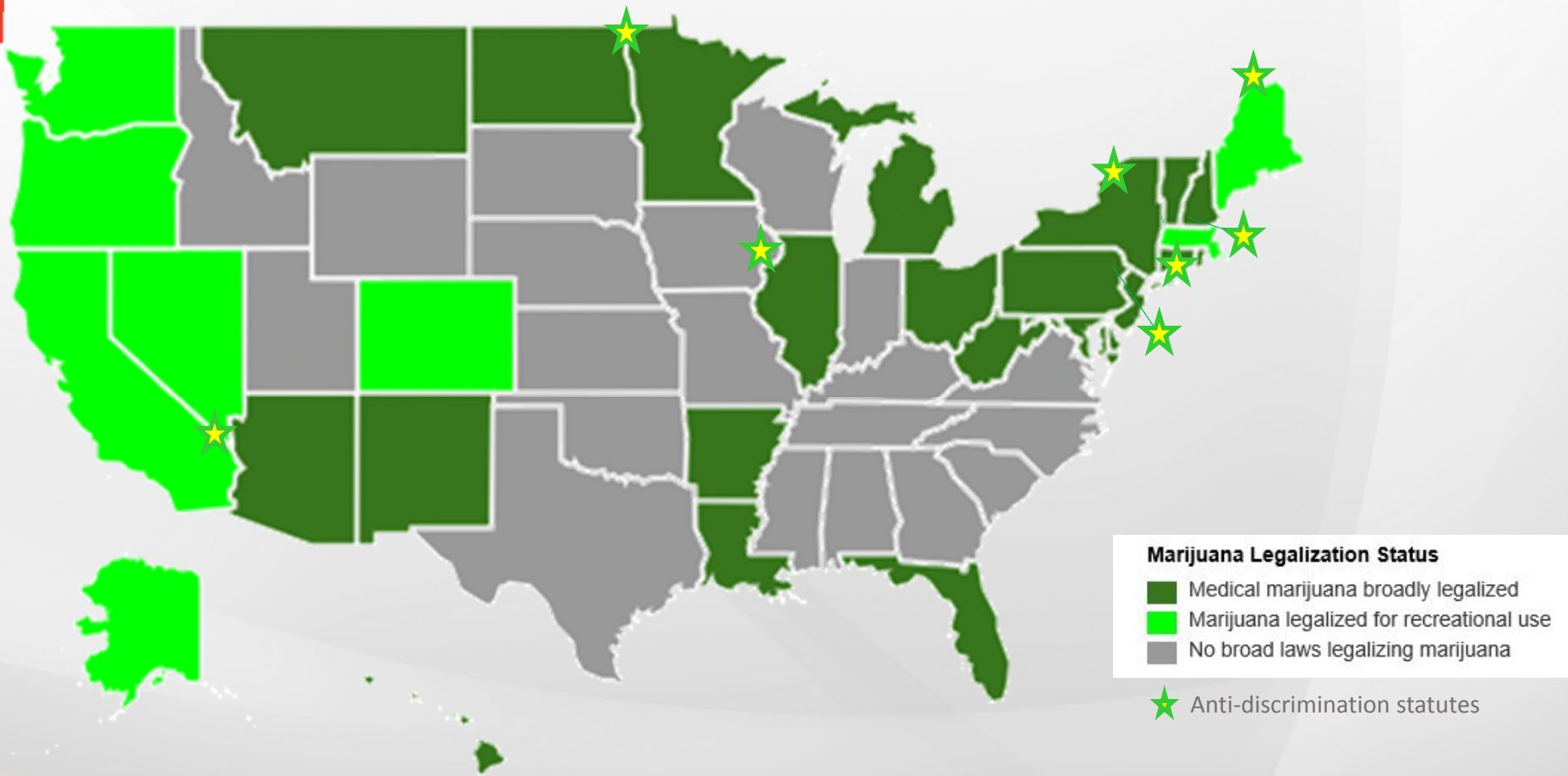
- "I am very detail-oriental."
- "I have a bachelorette degree in computers."
- "Work Experience: Dealing with customers' conflicts that arouse."
- Position Applied For: "Stalker."
- "As indicted, I have over five years of analyzing investments."
- "Note: Please don't misconstrue my 14 jobs as 'job-hopping' I have never quit a job."
- "I have an excellent track record, although I am not a horse."

Applications

- Update
- Ban the Box laws
- Background Checks – FCRA compliance



IN THE WEEDS . . .



Status of the Law - Federal

Still a Schedule I drug under the Federal Controlled Substances Act, which means according to the Feds:

- (1) high potential for abuse,
- (2) no currently accepted medical use in treatment in the US, and
- (3) lack of accepted safety for use of it.



So What Are Feds Doing?

Obama's DOJ: Oct. 2009, declared that enforcement of marijuana under CSA, with respect to state laws, was not a priority. No cases prosecuted.

Trump's DOJ: February 8, 2017, AG Sessions declared that states should "expect greater enforcement" of federal laws regarding marijuana.



The Courts:

Several courts have held that employers may prohibit marijuana use in their workforces:

- In 2008, **California's** highest Court found the state's medical marijuana law only protects individuals from criminal prosecution, ruling in favor of an employer who refused to hire an injured vet using marijuana to treat chronic back pain after he failed his pre-employment drug test.

Ross v. RagingWire Telecommunications, Inc., 42 Cal.4th 920

The Courts:

- In 2010, the [Oregon](#) Supreme Court ruled that medical marijuana's status as an illegal drug under federal law means that no employer should be forced to accommodate its use.
- In 2011, the [Washington](#) Supreme Court decided that employers need not accommodate an employee's use of medical marijuana, and that employees terminated for medical marijuana use – even offsite use – have no basis to sue their employers.

The Courts:

- In July 2017, the highest state court in the Commonwealth of Massachusetts issued a decision announcing that handicapped employees who have been prescribed medical marijuana may be entitled to a reasonable accommodation under the state's handicap discrimination law, while requiring employers to engage in an interactive process to assist in making this determination.

Barbuto v. Advantage Sales & Marketing, LLC

Handbooks and Contracts

Handbook Issues

- Disclaimer
- Acknowledgement
- At-will
- Discipline policy
- EEO policy
- Harassment policy
- On-line handbooks
- Other policy statements or memos

Handbook Issues

- Review for state laws
- Supervisor/Manager Training
- Other Issues



Employment Contracts

- Basic
- Implied
- Restrictive Covenants
- Severance Agreements



Harassment and Discrimination

Why Do We Cover This Topic?

Hypothetical



Michael works at an eye clinic assisting patients with post-visit care. When the doctors hired and interviewed Michael he identified as a male and dressed in traditional male clothing. Approximately a year after working at the clinic Michael began wearing makeup and traditionally female clothing, and he informed the doctors he intended to legally change his name to Brandi. Brandi also insisted on using the women's bathroom.

After this, and after coworkers expressed discomfort with Brandi's transition, the doctors stop referring patients to Brandi and her position was eliminated. A few months later, the clinic hired someone to perform a job similar to Brandi's previous position.

Policies and Training

- EEO
- Harassment
- No Retaliation
- Training

FMLA

FMLA Overview



Eligible employees receive up to 12 weeks of unpaid leave each year for:

- Birth of a child;
- Placement of a child for adoption or foster care;
- Care for a child, parent, or spouse with a serious health condition; or
- To obtain treatment for or recover from a serious health condition.

Military Caregiver Leave

- Leave for employees caring for family members with a serious injuries or illnesses incurred in military duty
- 26 weeks of leave to care for covered service member in a “single 12-month period”



Qualifying Exigency Leave

- Leave may be taken to handle non-medical exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or on call to active duty status (note – does not apply to next of kin)
- Maximum of 12 weeks of total FMLA leave in a year



FMLA FAQ's

- Do employees have to specifically request FMLA?
- Can I require a doctor's note for each intermittent absence?
- What if the FMLA paperwork is not complete?
- Does the FMLA overlap with any other laws?

ADA

- No Discrimination
- Reasonable Accommodations

Reasonable Accommodations



- Obligations did not change
- Determined on a case-by-case basis
- Employer allowed to define essential functions
- Requires interactive process

Possible Reasonable Accommodations

- Job restructuring
 - Job descriptions
- Modified workplace policies
- Reassignment to a vacant position
- Part time or modified work schedules
- Leave of known duration



Not A Reasonable Accommodation

- Providing a stress-free working environment
- Providing a new boss
- Allowing work rules violations
- Providing indefinite leave of absence
- Tolerating erratic attendance

Complying with the ADA

- Job descriptions
 - Suggested for every position
 - Must be accurate
 - Limit the number of “essential” functions
- Accommodation policy
- Train supervisors & managers on disabilities, accommodation and the interactive process



Religious Accommodation

Hypothetical

Jenna follows a faith that believes women should always wear long sleeves, long dresses (not pants), and not cut their hair after the age of 10. She has applied for a position in a manufacturing facility that requires everyone to wear a standard uniform which includes a short sleeve shirt, pants, and hat.

- **May the company deny Jenna employment if she refuses to wear the uniform?**



Wage & Hour

Hypothetical

- My manager tells me that I must stay within my labor budget. I tell hourly paid employees that if they need to work after the scheduled time, clock out and then “wrap it up.”
- Is this okay?



Follow Pay Practices

The Department of Labor's View:

- If you don't want to pay for the work, you must prevent it from being done
- Our pay policies are based on legal requirements



Pay Practice – After Hours

- John response to work-related texts and emails while watching TV after work.
- Any issues?

Keeping Track of Nonexempt Employees

- An employer must keep records of all time the employer knows about *or has reason to know about* – not just time employee is required or asked to work
- No working “off the clock”
- Keep accurate records of all time a nonexempt employee works each workday and each workweek
- Should be signed by employee
- Work time vs. non-work time

Meals & Breaks

- Federal law does not require lunch or coffee breaks.
- Short breaks (usually lasting about 5 to 20 minutes) are compensable work hours that would be included hours worked.
- Meals/Breaks of 30 minutes or longer are not included in hours worked.
- Some state/local laws required breaks



**Fisher
Phillips**



FUTURE OF THE DOL'S OVERTIME RULE

Overtime Rule

- Final Rule Under the Obama Administration
 - The annual salary threshold for exempt positions would have more than doubled from \$23,660 to \$47,476 (and would increase from \$100,000 to \$134,004 for HCEs)
 - Employers would have been allowed to use nondiscretionary bonuses to satisfy up to 10 percent of the general salary threshold, provided the incentives were made on a quarterly or more frequent basis.
 - No change in the general duties test.
- Court Challenge

EEO-1 Reports and Pay Equity

- All employers with 100 or more employees are required to submit an annual EEO-1 report disclosing employee data on race, ethnicity, and gender by occupational category.
- In October 2016, Obama's EEOC finalized a rule that would require these employers to also include pay data and the number of hours worked for their workforces based on these categories, intending to identify pay gaps. Employers were given a deadline of March 31, 2018, to first provide the pay data.
- On August 29, 2017, the White House Office of Management and Budget (OMB) issued an immediate stay of the rule until further review.
- Employers are still required to submit EEO-1 reports using the previously approved form by March 31, 2018.
- What should you be doing now?



State and Local Law Traps for the Unwary

- Ban the Box Laws
- Sick leave laws
- Parental Leave Laws
- Predictable Scheduling
- “Parking lot” Gun laws
- Local Overtime rules



Thank You



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