“I Don’t Like Your Face”:

Avoiding Bias in the Post-Acquisition Integration of Employees

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MICHELE BALLARD MILLER | WALTER M. STELLA

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Topics

- Avoiding bias in the hiring process
- Arrests and convictions
- Background checks
- Employee mobility
- Wages
- Best practices

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Avoiding Bias in the Hiring Process

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What Laws Apply

- Governing laws include:
  - Civil Rights Act of 1964 (**Title VII**)
  - Age Discrimination in Employment Act (**ADEA**)
  - Americans with Disabilities Act (**ADA**)
  - Genetic Information Nondiscrimination Act (**GINA**)
  - California Fair Employment and Housing Act (**FEHA**)
  - Local ordinances

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Protected Characteristics

- Protected characteristics include:
  - Race and color
  - National origin
  - Sex
  - Pregnancy and breastfeeding
  - Physical and mental disability
  - Age
  - Religion
  - Sexual Orientation
  - Gender expression and identity
  - Military and Veteran Status
  - Plus other state and/or local bases (e.g., height and weight)

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Medical and Disability Inquiries

- **Before making a job offer** employers MAY NOT:
  - Require **medical examinations**
  - Ask whether an applicant is disabled or about the nature or severity of a disability
  - Ask questions about an applicant's physical or mental impairment or how s/he became disabled, e.g. questions about why the applicant uses a wheelchair
  - Ask questions about an applicant's use of **medication**
  - Ask questions about an applicant's prior **workers' compensation** history

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Medical and Disability Inquiries

- **After making a job offer** employers MAY:
  - Require medical examinations -- but a key difference in ADA and FEHA standards: 1) under ADA, allowed if all entering employees in same job category are subjected to the exam; 2) under FEHA, allowed only if the exam is job-related
  - Ask whether an applicant is disabled or about the nature or severity of a disability
  - Ask about an applicant's physical or mental impairment or how s/he became disabled
  - Ask about an applicant's use of medication
  - Ask about an applicant's prior workers' compensation history
  - All inquiries **must be job-related!**

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Reasonable Accommodation

- Under the ADA and the California FEHA, employers must provide a "**reasonable accommodation**" to an applicant with a disability to enable the applicant to have an equal opportunity to be considered for a desired job
- The accommodation obligation arises when an applicant **requests** an accommodation or the **employer otherwise becomes aware** of the need for accommodation by observation or by a third party
- Possible accommodations may include:
  - Making facilities accessible
  - Allowing assistive animals at the worksite
  - Providing assistive aids and services, such as readers or interpreters

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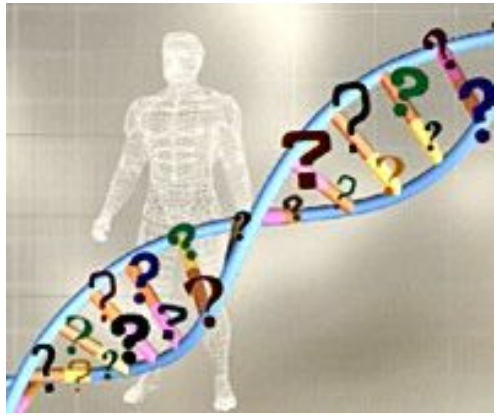
Genetic Information

- It is unlawful under the **Genetic Information Nondiscrimination Act** (GINA) to request genetic information of an applicant or an employee
- Employers may inadvertently violate the law by sending employees to medical/fitness for duty exams with outdated forms requesting family history or other genetic info
- **Update forms** to include "safe harbor" language putting health care provider and applicant on notice that genetic information is not being sought and should not be furnished!



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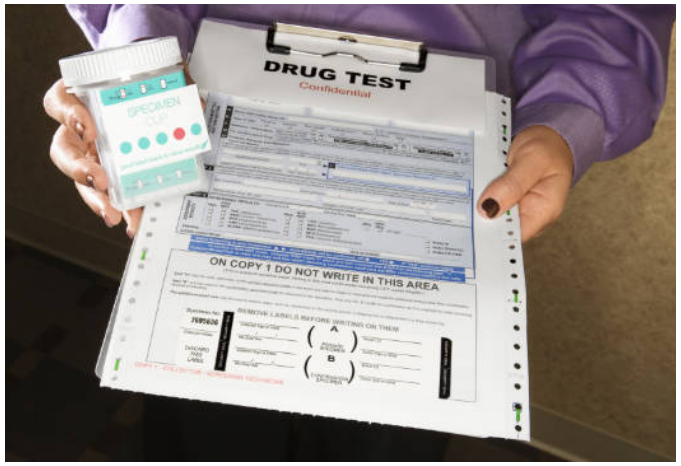
Drug Testing

- Drug testing is generally permitted, provided the testing is conducted in a **fair and consistent** manner and **administered to all applicants** who are applying for a position within a specific job class
  - Generally, it is safer to administer pre-employment drug tests only *after* job offers have been made
  - Pre-offer drug testing *cannot* reveal use of *legal* drugs
- Note: Local ordinances may further limit drug testing, *e.g*. San Francisco, Berkeley



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Restrictions on Use of Criminal History

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Equal Employment Opportunity & Criminal History

- EEOC guidance (2012): Arrests v. convictions?
  - Arrest record standing alone may not be used to take a negative employment action
  - Conviction record usually sufficient evidence of misconduct – but "individualized assessment" required

FEHA regulations effective July 1, 2017

- Criminal background checks must be job-related, consistent with business necessity, and tailored to the specific circumstances (nature and gravity of offense, time passed since offense, nature of job)
- Rebuttable presumption that a bright-line policy or practice automatically disqualifying all applicants with certain types of convictions is not sufficiently tailored to the job
- Employers must notify individual before taking adverse action and provide a reasonable opportunity to present evidence that the information is factually inaccurate

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California Labor Code 432.7

- Cannot ask applicant about or use:
  - Arrests that did not result in conviction
  - Information concerning referral to or participation in pretrial or posttrial diversion program
  - Certain minor marijuana convictions more than two years old
  - A conviction that has been judicially dismissed or sealed
  - Convictions in a juvenile court
- Not prevented from asking employee or applicant about arrest for which he/she is out on bail or own recognizance pending trial

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Megan's Law Database

- Megan's Law, enacted in 1996, created an online database containing information on registered sex offenders in California, pursuant to Cal. Penal Code 290.46
- Caution! The information in the Megan's Law database cannot be used for employment purposes except for the limited purpose of protecting a "person at risk." No definition of "person at risk"
- Violations subject an employer to liability for actual damages, plus up to three times the actual damages, plus attorney's fees and punitive damages. Employers may also be liable for a civil penalty of up to $25,000
- An employer's proper use of information obtained from the database must still comply with public records rules

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Ban-the-Box/Fair Chance Laws

- Ban-the-Box/Fair Chance laws or policies reserve discussion of criminal history to later in hiring process, so that applicants are judged on their qualifications, not on their past misconduct.
- No federal Ban-the-Box law
- States –
  - 34 states have adopted a Ban-the-Box law or Fair Chance policy
  - CA, CT, HI, IL, MA, MN, NJ, NM, OR, RI, VT, WA among states with Ban-the-Box laws for private and public employers that mandate removal of conviction history questions from job applications
  - California Fair Chance Act, effective Jan. 1, 2018 – amended FEHA to prohibit most employers from asking about or considering the criminal record of job applicants before making a conditional job offer
- Local - ~150 cities and counties have adopted some form of Ban-the-Box or Fair Chance laws, and 18 of those extend to private employers

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California Fair Chance Act (A.B. 1008)

A.B. 1008 makes it unlawful for covered California employers to:

- Include on any application for employment questions that seek the disclosure of an applicant's conviction history
- Inquire or consider the conviction history of an applicant before the applicant receives a conditional offer of employment
- Consider, distribute, or disseminate information about any of the following while conducting a criminal history background check:
  - An arrest that did not result in a conviction;
  - Referral to or participation in a pretrial or posttrial diversion program; and
  - Convictions that have been judicially sealed, dismissed, expunged or statutorily eradicated pursuant to law.
- After a conditional job offer is made, employers are allowed to conduct a criminal history check
- Employers cannot revoke a conditional job offer, however, without a Fair Chance process

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California Fair Chance Act (A.B. 1008)

Fair Chance Procedure

- Employers covered by A.B. 1008 cannot revoke a conditional job offer without a "Fair Chance Process" including:
  - Making an individualized assessment that justifies denying the applicant the position
  - Notifying the applicant in writing of a preliminary decision to take back the offer
  - Providing the applicant an opportunity to provide additional information
  - Notifying the applicant in writing of a final decision to remove the offer and informing the applicant of the right to complain to the DFEH
- Remedies for violation of the Act include: backpay, front pay, hiring/reinstatement, out of pocket expenses, policy changes, training, punitive damages, attorneys' fees and costs and damages for emotional distress.

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Employee Mobility and Trade Secrets

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Written Agreements for New Hires

Offer letter

- At will
- No other agreements
- Set conditions that must be met:
  - Proof of right to work
  - Background check

Employment agreements

- Non-Disclosure Agreements
- Assignment of Inventions Agreements
  - Labor Code section 2870
  - “Work for hire”

Handbook provisions

“Need to know” culture starts upon hiring!

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Noncompete Agreements

- Noncompetition agreements are generally illegal in California
  - *Cal Bus. & Prof. Code Section 16600*: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void"
  - **Edwards v. Arthur Andersen LLP** (2008) 44 Cal. 4th 937
- And, can't require employees to sign unenforceable noncompetes
  - California case law
  - Labor Code Section 432.5

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Section 16600 Exceptions

Section 16600 prohibition on noncompetition agreements contains specific exceptions:

- Person selling a business or substantially all of ownership interest in business (including goodwill) may agree with the buyer to refrain from:
  - carrying on a like business;
  - within a specified geographic area in which the business sold has been carried on;
  - provided the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein
- Also applies to dissolution of a partnership or a member leaving a limited liability company

Trade Secrets Exception

A trade secrets exception is not expressly stated in Section 16600

- **Asset Marketing Sys. v. Gagnon** (9th Cir. 2008) 542 F.3d 748: Ninth Circuit interpreted *Edwards* as not applying to restrictive covenants designed to protect employer's trade secrets

Courts have held that courts may enjoin tortious conduct under the Uniform Trade Secrets Act and Unfair Competition Law by banning the use of a former employer's trade secrets to identify, solicit or otherwise unfairly compete with the former employer's clients

Hiring from Other States

Most states other than California allow non-competition agreements if they are reasonable in scope, and sometimes, if they are designed to protect against illegal or unfair conduct

If individual is moving from a non-California company or worked outside of California, the former employer may try to enforce the noncompete in a non-California court

Take early steps to understand whether and to what extent a new hire's noncompetition agreement may be enforceable

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Garden Leave

"Garden leave" = Provisions authorizing salary and benefits during a nonsolicitation or noncompetition period

- *Garden leave provisions have not been tested in California courts*
- Such provisions may be of marginal utility:
  - The employee can always leave
  - The employer's option is to cut off payments

"Employee choice" doctrine

- Restrictive covenant not subject to the usual reasonableness standard when it is contingent upon an employee's choice between receiving and retaining a benefit - and competing.

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Non-Solicitation of Employees & No-Hire Agreements

Avoid the temptation to "agree" with competitors to a "hands off" agreement regarding each others' employees

Department of Justice has pursued Google, Apple, Pixar, Lucasfilm, Adobe, Intel, and Intuit for "no poaching" agreements

VLS Systems v. Unisen (2007) 152 Cal.App.4th 708: No-hire agreements may violate section 16600

AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.(2018) 28 Cal.App.5th 923: Non-solicitation of employee provisions are unenforceable.

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Labor Code Section 925

Effective Jan. 1, 2017 - enacted in response to agreements containing restrictive covenants and foreign choice of law and forum

Cannot require California employee to agree to employment provision, as a condition of employment, that contains non-California forum or choice of law

- Exception: If employee represented by counsel for purposes of negotiating the agreement, including the forum and choice of law provisions – not clear if use of exception gets around B&P 16600

Mechanix Wear, Inc. v. Performance Fabrics, Inc. (C.D. Cal. Jan. 31, 2017) 2017 WL 417193: Interpreting section 925 as inapplicable because former employee did not "agree to" forum selection clause while a resident of California

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Wages

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Vacation/PTO

- Accrued vacation pay or PTO must be paid upon termination
- Commencement of employment with “NewCo”
  - “OldCo” must pay accrued vacation pay/PTO upon termination of employment to “NewCo”
- Exception: written consent of employee to transfer vacation/PTO balance

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Successor Liability

- Asset sale may not limit liability exposure of acquiring entity
- Federal common law test:
    1. Successor company had notice of potential liability; and
    2. Ability of predecessor company to provide relief to employees; and
    3. Substantial continuity of business.

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New Hire Notice

- The California Wage Theft Prevention Act requires that employers provide **nonexempt new hires** with a **disclosure** containing:
  - **Rates of pay** and basis thereof (hourly, shift, day, week, salary, commission, piece, and any applicable overtime rates)
  - Allowances (meal, lodging, etc.) claimed against minimum wage
  - Regular **paydays**
  - **Paid sick leave** (effective July 1, 2015)
  - Name of the employer and any "dba" names
  - Telephone number and physical address of employer's main office, and mailing address if different
  - Name, address, telephone number of workers' comp carrier
  - Other information the Labor Commissioner deems material and necessary
  - **Template**: http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf

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AB 2282 – Salary History & Equal Pay

- Amends and clarifies ambiguities created by prior pay equity legislation
- Clarification of key terms:
  - "applicant" is an individual who seeks employment with the employer, not a current employee
  - "pay scale" is a salary or hourly wage range
    - Definition of "pay scale" does not include bonuses or equity ranges
  - "reasonable request" is defined as a request made after the applicant has completed the initial interview
- Employers may ask about an applicant's salary *expectations* for the position
- Clarifies under what circumstances an employer could use prior salary to justify a disparity in pay
- *Rizo v. Yovino* (9th Cir. 2018) 887 F.3d 453: "prior salary alone or in combination with other factors cannot justify a wage differential" under Equal Pay Act.

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Best Practices

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Best Practices

- Training employees involved in the recruitment and selection process is key! Screeners as well as decision makers must be informed on EEO laws and permitted areas of inquiry during interviews
- Ensure compliance with background check laws
- Implement screening procedures for information gathered from the Internet
- Assess **job-relatedness** of arrests, convictions, bankruptcies or other unfavorable information that comes to light during the hiring process
- Assess potential disparate impact of hiring policies or practices
- Provide for **second level of review** of hiring decisions whenever possible
- Complete required paperwork within legal time limits

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