



MONDAY MOTIVATOR

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Introducing Bob Nonnemaker

Our guest contributor for this edition is Bob Nonnemaker, founder and president of Background Check Advisors, based in Irvine, CA. Bob has been a lifelong entrepreneur, having started companies in various industries, including insurance and financial planning, residential and commercial lending, cost segregation, veterans benefit planning and franchise consulting. Bob recently helped his son Kevin open a franchise store in Fountain Valley, CA called Experimac, where Kevin is learning the finer points of business ownership, sales, marketing and customer service from dad. And, dad has learned a lot from Kevin about all the things he can do with his Apple phone other than talk and text! Bob has turned his passion of working with business owners into his newest venture, a company that provides background screening and drug testing services to businesses of any size in all industries. The mission of this business is to provide prescreening solutions for safe hiring and to promote drug free homes, schools and workplaces.

CA Employers – Are you ready for Ban the Box?



On October 14, 2017, California Gov. Jerry Brown signed CA [Assembly Bill 1008](#) into law, which is set to take effect on January 1, 2018. Known as the “Ban the Box” legislation, in reference to the box applicants are asked to check if they have any prior criminal convictions, the new law prohibits employers with five or more employees from inquiring about or considering a job applicant’s conviction history prior to an offer of employment. Here is the link to Assembly Bill 1008: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1008

The new Ban the Box legislation in California is in line with several similar laws and regulations recently adopted across the country. The movement to “ban the box” began with the simple removal of the criminal history/record box on the employment application to prevent early rejection in the hiring process, allowing applicants to make it through the interview before disclosing a criminal history.

Additionally, California employers can no longer ask job applicants about their prior salary and — if applicants ask — must give them a pay range for the job they are seeking. [AB168](#) applies to all public- and private-sector California employers of any size. The goal is to narrow the gender wage gap. If a woman is paid less than a man doing the same job and a new employer bases her pay on her prior salary, gender discrimination can be perpetuated, the bill’s backers say. Last year, the state passed a “weaker law” that said prior compensation, by itself, cannot justify any disparity in compensation.

The new bill goes further by prohibiting employers, “orally or in writing, personally or through an agent,” from asking about an applicant’s previous pay. However, if the applicant “voluntarily and without prompting” provides this information, the employer may use it “in determining the salary for that applicant.”

This is all very interesting for the business owner who wants to be fair to all applicants, while still having some freedom and latitude in the critical new hire decision making process. Clearly, pre-judging an applicant (at least on criminal history and prior salary) before an offer of employment is now against the law. Pre-judging is built in to our human nature and while we are all getting a good lesson in its’ consequences lately, it certainly puts yet one more burden on business owners and HR professionals to be so extra careful to avoid exposure and potential litigation. Where was



all of this “no pre-judging” stuff when I was trying to secure a high school prom date? Considering that the readership of this article is comprised predominantly of business owners, directors, managers and the like, I feel safe in saying that this feels like yet one more move by the state of CA to enhance its’ reputation as the leader in pro consumer and anti- business legislation to slow down the “bullet train” (that’s another article for another day) of business growth and expansion.

So, while we can all debate the pros and cons of this legislation from the viewpoint of both sides - employer and job applicant – and get into long arguments about social and economic injustices, we simply won’t do that here. Rather, we will look at some immediate ramifications of this new legislation and some basic suggestions that CA employers should consider in preparation for changes to the CA Labor Code on Jan 1st, 2018. Be advised that none of these suggestions are intended as legal advice and are in no way a substitute for employers seeking counsel from an employment attorney and/or professional HR consultant.

All California employers with five or more employees should consider doing the following:
 1) **Review their employment application** to make sure that it does not contain any question that seeks disclosure of an applicant’s criminal conviction history.

2) **Review policies/procedures** to make sure that there is no inquiry into the criminal conviction history of an applicant before the applicant receives a conditional offer of employment.

3) **Train HR and hiring personnel** regarding the assessment and notification process after a conditional offer of employment is made and the applicant's background check reveals a criminal conviction.

One immediate change that this legislation brings is as follows: When considering an applicant's criminal conviction history, certain guidelines **MUST** be followed in the background screening process which prohibit an employer from engaging in various defined forms of discriminatory employment practices. These guidelines are in place to protect both the employer and applicant. While this new legislation is about a "fair chance" for all applicants, let's not forget that employers are going to be under the microscope for all the details and nuances in their policies and procedures, and need to be extra diligent to avoid the wrath of lawsuit happy enthusiasts who will surely try to benefit from the "mishandling" of their application.

Regarding background screening and the subsequent uncovering of a criminal conviction, what can an employer do to mitigate their exposure and liability in this area? We're glad you asked!

Implementing a thorough background screening process is now more critical than ever as employers will no longer have the ability to make a quick assessment of a person's criminal history without a formal background check. Without the question about prior convictions and the "Yes/No" answer box, employers will no longer have the luxury of seeing the "Yes" box checked on the application and moving on to the next candidate. The only viable option now will be to run the background check after the offer of employment. And, here's the tricky part that must be handled with care by the employer. If a conviction is found on the applicant's record, the new legislation mandates that the employer has some significant responsibilities before rejecting the applicant.

First, the employer **MUST** make a copy of the background report available to the applicant and the employer **MUST** do an individualized assessment of the situation, whereby the nature and gravity of the offense, amount of time passed since the conviction, and the nature of the position applied for, are all weighed into the decision to hire or not hire.

If the assessment leads the employer to decide to disqualify the applicant, the employer **MUST** send the applicant a "pre-adverse item" letter explaining that something was discovered on the applicant's report that may affect the employer's decision to hire. Then, the employer **MUST** give the applicant five days to respond to this letter. If the applicant disputes the accuracy of the report and is taking steps to provide evidence to the contrary, the employer **MUST** give the applicant an additional five days to do so. Otherwise, the employer **MUST** send the applicant a "post adverse item" letter stating that based solely or in part on the applicant's criminal history, a final decision was made not to hire.

In summary, the administrative burden on CA employers has jumped up a notch and clearly, this opens the door for the mishandling of applications at various points throughout the hiring process. If all of this seems daunting, don't hesitate to reach out to Bob for a free consultation and he'll be glad

to assess your current practices and offer guidance on being compliant with this new legislation, specifically in terms of your background screening process.

Our thanks to Bob Nonnemaker for his generous professional insight to this important new issue!

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