

Daily Journal

Monday, May 16, 2011

Firing Sex Offenders Gets Dicey

By Catherine Ho

As searching for the online profile of an employee or co-worker becomes an everyday occurrence, lawyers have focused intently on advising clients how - and how not - to use information they glean from the Internet.

But what about when that search is not on Facebook or Twitter, but California's Megan's Law website?

A successful search for an employee on the database of registered sex offenders, which went up in 2004, can be wrought with thorny legal issues that employment lawyers said they are just starting to confront.

'This is an example of how employers can blow it by getting onto a website that's public but they don't know there are limitations to how that information can be used.'
-Apalla Chopra

"As of late, because of the public nature of the website, it's occurring more in the workplace," said Dana Kravetz, head of the labor and employment department at Michelman & Robinson LLP, who represents companies.

One client came to him after a manager at the company complained about a supervisee whose name appeared in a search of the Megan's Law website.

"The manager said, "I don't want to work with this person, they're a sex offender and it makes me uncomfortable,'" Kravetz said. "Can they fire the sex offender?"

The answer in many cases is yes, according to employment specialists, but only if an employer first confirms the information through other sources. State labor laws prohibit employers from firing a worker over a previous arrest, and Megan's Law clearly states an employer can't fire someone based on information found through the website.

The tension is a case of the law lagging behind technology, employment experts said. The website makes public information that was once harder to come by, at a time that the workforce is savvier than ever about how to dig up information on a coworker or manager's unsavory past.

Several attorneys like Kravetz declined to identify particular clients but said they've fielded increasing calls about how to handle an employee who is a registered sex offender.

Despite some litigation around the issue there has been little guidance for companies.

In March 2010, a California appellate court waded into uncharted legal territory regarding Megan's Law and its application in the workplace, finding the job agencies that screen applicants can pass information they find on the Megan's Law website to a prospective employer. *Mendoza v. ADP Screening and Selection Services Inc.* 2010 DJDAR 4371 (Mar. 23, 2010)

But the opinion did not touch on how employers dealing with a current employee must act.

"If the employer does its own investigation, they can fire someone for the same reason they got arrested," said Jeffrey Winikow, an employee rights lawyer. Winikow said he years ago negotiated a settlement on behalf of a worker fired after his employer found out he had been arrested on child molestation charges.

An investigation could include anything from a criminal background check to a Google search that brings up news articles written about someone's arrest or conviction.

Employers shouldn't assume just because Megan's Law is a public website they can use it in an employment decision, said attorney Apalla Chopra, who specializes in employment defense at O'Melveny & Myers LLP.

"This is an example of how employers can blow it by getting onto a website that's public but they don't know there are limitations to how that information can be used," Chopra said.

"Most employers have no idea if they get on to the Megan's Law website and find someone who's a sex offender and use that in turn to make employment decisions ... I don't think employers realize they're violating the law."

Employers have to walk the line between following the law by not illegally discriminating against employees, while maintaining a comfortable work environment for colleagues who may not like working alongside a sex offender.

Lawyers said litigation around the issue was rare for two reasons: a registered criminal offender isn't part of a protected class, like race or disability, and a sex offender who sues for wrongful termination isn't likely to win sympathy from a jury.

"The employer should use the information in the same way they'd use any other derogatory information they learn about an employee, say they were convicted of

fighting in public," Chopra said. "They ought to use this information no differently than information that has less stigma attached to it."