

What Every Employer Should Know: The Nuts and Bolts of Regulations, Laws and Best Practices

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Disclaimer

Please Note:

- Julie Brown makes every effort to offer accurate, common-sense, ethical Human Resources management, employer, and workplace advice but she is not an attorney, and the content in this seminar, while authoritative, is not guaranteed for accuracy and legality, and is not to be construed as legal advice. When in doubt, always seek legal counsel or assistance from State, Federal, or International governmental resources, to make certain your legal interpretation and decisions are correct. This seminar information is for guidance, ideas, and assistance only.

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New Labor Laws

- **Personnel Files AB 2674**
- This bill amends section 1198.5 of the Labor Code relating to employee rights to inspect personnel files. Requires employers to
 - Maintain employee personnel files for at least 3 years following termination of employment
 - To permit current and former employees (or their designated representatives) to inspect and copy personnel records, within 30 days of a request to do so by the employee.
 - The bill specifies that an employer is not required to comply with more than 50 requests for copies of personnel records by a representative of employee(s) in one calendar month.

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New Labor Laws

- **Personnel Files AB 2674**
- The requirements of this section do not apply to:
 - (1) Records relating to the investigation of a possible criminal offense.
 - (2) Letters of reference.
 - (3) Ratings, reports, or records that were:
 - (A) Obtained prior to the employee's employment.
 - (B) Prepared by identifiable examination committee members.
 - (C) Obtained in connection with a promotional examination.

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New Labor Laws

- **Personnel Files AB 2674**
- (n) If an employee or former employee files a lawsuit that relates to a personnel matter against his or her employer or former employer
 - the right of the employee, former employee, or his or her representative to inspect or copy personnel records under this section ceases during the pendency of the lawsuit in the court with original jurisdiction.
- (o) For purposes of this section, a lawsuit “relates to a personnel matter” if a current or former employee’s personnel records are relevant to the lawsuit.

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What to Keep in Personnel File

- Employee Personnel File
- Medical File
- Payroll File
- I-9 Forms File for Employees
- What Not to Include in an Employee Personnel File
 - Any medical information belongs in the medical file.
 - Payroll information belongs in the payroll file.
 - Supervisory documentation for the purpose of managing an employee’s work should be filed in a private, supervisory folder.
 - Investigation material including the employee complaint, witness interviews, employee interview, findings, attorney recommendations, and resolution, plus follow-up to ensure no retaliation, should reside in an investigation file that is separate from personnel records.
 - File employee I-9 forms in a file away from employee personnel records.

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New Labor Laws

- **Commission Agreement that complies with AB 1396**
 - Effective January 1, 2013 you are required to have an agreement that identifies the following:
 - What the commission is
 - How the employee can earn the commission
 - How the employer will compute the commission
 - How the commission will be paid
 - When the commission will be earned

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New Labor Laws

- **Commission Agreement - Best Practices**
 - Be in writing, signed and include an acknowledgment of receipt for the employee to sign.
 - Set forth eligibility criteria, such as which employees are covered, length of service, etc.
 - Define when a commission is “earned.”
 - Explain that “advances” of unearned commissions are loans that must be reconciled against later, earned commissions.
 - Lawfully define “commission” to avoid formulas that may be held invalid.
 - Explain the formula for computing commissions, including commission rates, and whether the rate is applied to gross sales, net sales, gross margin, etc.

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New Labor Laws

• Commission Agreement - Best Practices

- Explain how “splits,” changes in territory or reassigned customers are treated under the plan.
- Address how returns and refunds affect commissions, if applicable.
- Address termination of employment and its effect on unearned or unpaid commissions.
- Avoid language that may sound like a “forfeiture” of an otherwise earned commission.
- Include the term of the agreement, and how commissions will be paid on sales made before and after the effective date of the plan.
- Explain the employer’s discretion to interpret, modify or discontinue the terms of the plan.

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New Labor Laws

• Meal and Rest Periods. (Brinker Case)

- *CA Employers do not have to ensure employees take their meal breaks.*
- You cannot employ someone for a work period of more than five hours without providing an unpaid, off-duty meal period of at least 30 minutes. The first meal period must be provided no later than the end of the employee’s fifth hour of work.
- The employer satisfies its legal obligation to provide an off duty meal period to its employees if it:
 - Relieves its employees of all duty.
 - Relinquishes control over their activities.
 - Permits them a reasonable opportunity to take an uninterrupted, 30-minute break.
 - Does not impede or discourage them from doing so.
- A meal break can be unpaid only if all of the above conditions are met.

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New Labor Laws

- **Meal and Rest Periods. (Brinker Case)**

- When a work period of not more than six hours will complete the day's work, the meal period may be waived by mutual consent of the employer and the employee
- Make sure the work that needs to be done can actually be done in the allotted hours. Otherwise, employees will find a way to get the work done outside regular paid time

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New Labor Laws

- **AB 469 Wage Theft Protection Act of 2011.**

- Effective January 1, 2012
- Amends Labor Code section 2810.5
- All CA employers must provide each employee at the time of hire with a written notice that contains specified information
 - Except to an employee who is exempt from the payment of overtime wages
 - or for an employee who is covered by a valid collective bargaining agreement
- Does not apply to a security services company that is licensed by the Department of Consumer Affairs and that solely provides security services.

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New Labor Laws

- **AB 469 Wage Theft Protection Act of 2011.**
 - Must be provided in the language the employer normally uses to communicate employment-related information
 - Notice required under Labor Code 2810.5 must be on its own form.
 - Labor Commissioner – Sample Template available to comply with the requirements- FAQ page
 - <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>

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New Labor Laws

- **AB 469 Wage Theft Protection Act of 2011.**
- Some of the required information must provide:
 - Rate or rates of pay, including overtime.
 - Allowances, if any, claimed as part of the minimum wage.
 - The employer's regular payday.
 - The employer's name, phone number, physical address of the employer's main office or principal place of business, and a mailing address, if different.
 - The name, address and phone number of the employer's workers' compensation insurance carrier.

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New Labor Laws

- **Workers' Compensation System Reform. SB 863**
 - Offsets necessary increases in permanent disability benefits and potentially lowers system costs for employers by reducing delays and litigation in the system
 - Addressed the lien epidemic,
 - Shortens the medical legal process
 - Implementing an independent medical review system
 - Streamlining the permanent disability schedule
 - Most changes effective 1-1-13 and for all dates of injuries

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New Labor Laws

- **Background Checks- Criminal**
 - **Per EEOC –Employer must have legitimate Business reason why not to hire a felon**
 - **Set up specific company policy – Recommend using DOI requirements as a guideline**

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New Labor Laws

• Background Checks- Criminal

- DOI Guidelines
- § 2183.2. Substantial Relationship Criteria for Crimes or Wrongful Acts.
 - Licensee or applicant lacking integrity, having a poor business reputation, or that permitting the licensee or applicant to hold an insurance license is against the public interest.
 - The following is a partial list of crimes or acts that are substantially related to the qualifications, functions or duties of an insurance licensee:
 - (a) Any felony conviction;
 - (b) A misdemeanor conviction which evidences present or potential unfitness to perform the functions authorized by the license in the manner consistent with the public health, safety, and welfare, including but not limited to, soliciting, attempting, or committing crimes involving the following:
 - (1) Dishonesty or fraud;
 - (2) Any conviction arising out of acts performed in the business of insurance or any other licensed business or profession;
 - (3) Theft;
 - (4) Sexually related conduct affecting a person who is an observer or non-consenting participant in the conduct or convictions, or which requires registration pursuant to the provisions of Section 290 of the Penal Code;

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New Labor Laws

• Background Checks- Criminal

- (5) Resisting, delaying, or obstructing a public officer in violation of Penal Code Section 148;
- (6) Any act or offense wherein the person willfully causes injury to the person or property of another;
- (7) Violation of a relation of trust or confidence, or a breach of fiduciary duty;
- (8) Multiple convictions which demonstrate a pattern of repeated and willful disregard for the law.
- (c) Any act which demonstrates a willful attempt to derive a personal financial benefit through the nonpayment or underpayment of taxes, assessments, or levies duly imposed upon the licensee or applicant by federal, state or local government or a willful failure to comply with a court order.

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New Labor Laws

• Background Checks- Criminal

• § 2183.3. Weight of Substantially Related Acts.

- In considering discipline of a license or license application, the weight to be accorded to a substantially related crime or act described
 - (a) The extent to which the particular act or omission has adversely affected other person(s) or victim(s), including but not limited to, insurers, clients, employers or other persons, and the probability such adverse effects will continue;
 - (b) The recent or remoteness in time of the act, misconduct, or omission;
 - (c) The type of license applied for or held by the licensee or applicant involved;
 - (d) The extenuating or aggravating circumstances surrounding the act, misconduct, or omission;
 - (e) Whether the licensee or applicant has a history of prior license discipline, particularly where the prior discipline is for the same or similar type of conduct.

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New Labor Laws

• Background Checks- Criminal

• DOI - Prohibited Person

- Any person who has been convicted of felony crimes of dishonesty, breach of trust in a state or federal jurisdiction or who has been convicted of any violation of Title 18 U.S.C. § 1033 (the "Act").
- "Breach of Trust" means: Crimes including, but not limited to, any offense involving misuse, misapplication, or misappropriation of (1) anything of value held as a fiduciary or (2) anything of value of a public, private or charitable entity. (CCR 2175.2(c))
- "Dishonesty" means: A crime which includes, but is not limited to, any offense involving perjury, bribery, forgery, counterfeiting, false or misleading oral or written statements, deception, fraud, schemes or artifices to deceive or defraud, material misrepresentations and the failure to disclose material facts. (CCR 2175.2(g))

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New Labor Laws

• Background Checks- Criminal

- Employer's Responsibilities- DOI Website
 - It is the responsibility of the employer to ensure that any "Prohibited Person" who is currently employed or being considered for employment has received written consent from the DOI.
 - It is the responsibility of the employer to ensure that any prohibited person who is currently employed or being considered for employment is not permitted to conduct the business of insurance
 - Does the insurance company or an insurance producer who hires temporary employees through an employment agency have an obligation to fulfill the Title 18 U.S.C., § 1033 requirements for those individuals? Yes. Even though these individuals are not employees of the insurance company or insurance producer, they do perform activities that are incidental to the business of insurance.
 - Must use a specific FICRA form – use one from your 3rd party vendor. Starting January 1, 2013

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New Labor Laws

• Background Checks - Credit

- **AB 22 prohibits employers and prospective employers, not including certain financial institutions, from obtaining and using consumer credit reports (credit information) about applicants or employees.**
 - Took away your ability to run a credit check on everyone
 - Must have a high security or \$\$ issue to order
 - The prohibition does not apply to “managerial positions,” defined as those who qualify for the executive exemption from overtime.

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New Labor Laws

• Background Checks - Credit

- The prohibition against obtaining and using credit reports also does not apply to the following:
 - Law enforcement positions and positions for which the information is required by law
 - Positions that involve regular access (other than in connection with routine solicitation and processing of credit card applications in a retail establishment) to bank or credit card information, Social Security numbers, and date of birth
 - Positions in which the person is, or would be, a named signatory on the employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on behalf of the employer

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New Labor Laws

• Background Checks - Credit

- Positions that involve access to confidential or proprietary information
- Positions that involve regular access to cash totaling \$10,000 or more of the employer, a customer, or client during the workday
- *This bill would also require the written notice informing the person for whom a consumer credit report is sought for employment purposes to also inform the person of the specific reason for obtaining the report, as specified.*

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Background Checks

- As of January 1, 2013, the enforcement of compliance rules for the conducting of third-party background checks will transfer from the FTC to the newly formed Consumer Protection Financial Bureau (CPFB)
- Requires an update to forms used for reporting checks under the Fair Credit Reporting Act (FCRA).
- Three new forms to 16 CFR part 698 and labeled Appendices F, G, and H. The forms are available on the official federal regulations website

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Background Checks

- The new protocol that must be followed in order to remain in compliance with the FCRA involves the following steps:
 - Informing applicants of the intent to run a background check;
 - Obtaining authorization to perform a background check from applicant (or employee) in advance;
 - Giving advanced notice to an applicant (or employee) that the company is taking an action adverse to that person's employment status based on information obtained from a background check; and
 - Notifying all affected parties.

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Reference Checks

- **Don't do a reference check without the informed consent of the candidate**

- **What Can a Former Employer Say During a Background Check?**
 - HR should handle all employment verification calls
 - Require a signed release from the former employee
 - Give standard answers for all verifications
 - Exact dates a person was employed
 - Title
 - Final salary
 - **Any other info as long as only provide the facts - If it's your opinion only, keep it to yourself**

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Reference Checks

- California law prohibits employers from intentionally interfering with former employees' attempts to find jobs by giving out false or misleading references.

- Jobs such as truck driver positions fall under regulations of the federal Department of Transportation. Employers are required to accurately respond to an inquiry from a prospective employer about whether you took a drug test, refused a drug test, or tested positive in a drug test with the former or current employer.
- Sample Consent Form

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New Labor Laws

- **Background Checks - Social**

- California now bars employers from demanding employees' social media log-in info
 - Should run a search on each new hire to see what you can find
 - TRAP: cant use what they say online about past Company or Boss against them (Bad mouthing)

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Social Media

- **What Facebook Reveals About Candidates**

- More relevant question: what do they expect to find?
 - Pictures of drunken behavior?
 - Picture of person standing in front of a marijuana plant?
 - Making racist statements?

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Useful data on Facebook

- Research shows a link between the number of friends a person has on Facebook and the degree to which s/he is a “socially disruptive” narcissist
 - Tag themselves more often
 - Change their profile pictures a lot
 - Update their newsfeeds more regularly tend to be very narcissistic — suggesting a toxic personality?

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Useful data on Facebook

- Research shows a link between the number of friends a person has on Facebook and the degree to which s/he is a “socially disruptive” narcissist
 - Need to be constantly at the center of attention.
 - Cannot stand to be ignored or waste a chance of self-promotion, so they often say shocking things or inappropriately self-disclose.
 - They have a sense of deserving.
 - A person displaying these traits in the workplace can be a very disruptive influence

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Useful data on Facebook

- Can add some value to a selection process
 - It is subjective and/or incomplete.
- Using any information gleaned from Facebook can be a violation of privacy or discrimination issues.
- Laws are already being proposed in several states and at the federal level, which would effectively block employers from using any information on social networks as a source of information for screening applicants.
 - More to come.....

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LinkedIn

- **Who Owns your Account?**
- **Is LinkedIn different than Facebook?**
 - Most of the material on LinkedIn is meant to be public.
 - It can be as reliable as a resume
 - It may very well be just a marketing document for a person, but at least it's usually meant for general consumption
- **Check on Network size** – Using LinkedIn, Facebook, or Twitter to assess the breath of their contacts and connections

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LinkedIn

- **Protecting Your Sales Rep's LinkedIn Connections**
- *Lock-down Your Contacts*
 - This is essentially the nuclear option that closes your network. With a closed network your connections can see your entire profile, but cannot see your full list of connections. The one exception is that your connections can see connections that you share together.

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LinkedIn

- **Steps to configure a LinkedIn account to lock-down your connections:**
 - Login to their LinkedIn account
 - Select 'settings' which is located under your name at the very the top menu on the right side
 - Under Privacy Controls, select the text link titled 'Select who can see your connections'
 - Toggle the drop down from 'Your Connections' to 'Only You'
- Advantage: Reliable method of locking down contacts
- Disadvantage: Eliminates networking transparency when requesting new connections

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LinkedIn

- **Sales Leaders Must Provide Guidelines for Success**
 - Develop LinkedIn guidelines for your sales team.
 - Prospecting best practices from your top reps using LinkedIn
 - Have your reps adopt this options to protect their connections.

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Best Practices if you do Internet Searches on Applicants

- Avoid using protected characteristics as a basis for decision
- Develop a protocol and run the same searches consistently for all similarly situated applicants
- Consider creating a firewall so decision-makers do not see TMI
- Consider informing applicants up front and obtaining a consent
- Consider asking applicants about adverse information before making a decision on information that may be unreliable
- Avoid any pretext (i.e “friending” to gain access to private areas)

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Alternative leading-edge candidate assessments

- **Interviews**
 - **Traditional interviews**
 - **Speed dating type Interview**
 - **Peer or group interviews**
 - **Stress interviews**
 - **Interview for competitive intelligence**
 - **Hire with absolutely no assessment**
- **Remote interviews**
 - **Live remote video interviewing**
 - **Videotaped**
 - **Internet questionnaire**

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Alternative leading-edge candidate assessments

- ***Problem-solving and interest approaches during and outside of interviews***
 - **Verbal problems during interviews**
 - **Virtual reality simulation**
 - **Bring work samples**
 - **Work with the team**
 - **Shadow employees**
 - **Project the future**

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Alternative leading-edge candidate assessments

- **Screening**
 - Identify and assess prospects using external **contests**
 - Self-assessment **using a real problem** that is provided on the corporate website
 - Assessment or self-assessment using games on the corporate website
 - **Video cover letter** — Encourage a video in lieu of a written cover letter and use it for assessment.
 - **Use a LinkedIn profile**
 - **Review their work portfolio**

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Alternative leading-edge candidate assessments

- **Assessment *prior to the interview***
 - **Job assignment**
 - **Identify their preferences**
 - **Job acceptance criteria**

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Alternative leading-edge candidate assessments

- **Tests as supplements to interviews**
 - Commercial tests
 - On-line tests
 - In-basket
 - Psychological tests

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Alternative leading-edge candidate assessments

- **Visibility scores as supplements to interviews**
 - Google score
 - Social media scores
 - Klout
 - PeerIndex
 - Network size
- **Assessing their *references* or background**
 - **Assess them on their social media site** – Visit their personal social media sites for assessment and to identify potential problem areas

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Insurance Industry

- **Jobs Report: U.S. Insurance Industry Growth Continues**
 - Best's News Service (10/12/12) Jeff Jeffrey
 - U.S. insurers added 2,800 jobs in September 2012, a 0.12% increase over August. The job growth seen in September continues the increase seen since March.
 - According to the U.S. Bureau of Labor Statistics, the sector has added 12,800 jobs this year, following several years in which sector employment declined significantly for months at a time.

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Resources

- Labor Commission www.dir.ca.gov
- Dept. of Fair Employment and Housing www.dfeh.ca.gov
- EDD www.edd.ca.gov
- CA Chamber of Commerce <http://www.calchamber.com>

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Thank you for coming!

- Aha! Moment
 - What did you learn today?

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