

## Labor Law Release

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### Do You Have an Employee on the Megan's Law Website?

In 2003, the U.S. Supreme Court validated the sex offender internet disclosure laws of Alaska. *Smith v. Doe*, 123 S.Ct. 1140 (2003). One of the reasons given for upholding the law was that it did not affect the offender's ability to find housing or employment. Within a few weeks of this decision, website disclosure of sex offenders in the California database was added to Assembly Bill 488, permitting unfettered access to the identities of sex offenders along with restrictions on use, including in the employment context.

The "Megan's Law" website has experienced an overwhelming number of hits. We have discovered that many of those hits are by employees searching out whether co-workers are identified as sex offenders. Unfortunately, these actions can result in substantial problems for an employer.

As part of Megan's Law, the Penal Code was amended to include protections for persons whose identities are posted on the website. Except in limited circumstances use of any information that is disclosed pursuant to this section for purposes relating to employment is prohibited.

One of the few exceptions is to protect "persons at risk." The Penal Code defines a "person at risk" as a person who is or may be exposed to a risk of becoming a victim if a sex offense is committed by the offender.

Unfortunately, there is no other legal authority concerning the use of information disclosed via the Internet for employment purposes. If law enforcement believes that a person is at risk, it can disclose information to persons likely to encounter the sex offender. "Likely to encounter" includes persons at the place of the

offender's employment if ordinary contact is reasonably probable.

A violation of Megan's Law makes the user liable for actual damages, an amount not exceeding three times actual damages, attorneys' fees, punitive damages and a civil penalty not exceeding \$25,000.00. Therefore, it is important to exercise caution when an employee's identity is disclosed under Megan's Law.

What should you do if you discover an employee is identified on the Megan's Law website? Certainly, you should investigate. You must determine whether or not the employee poses a risk to co-workers, customers, clients, patients or other third-parties.

An employer may be held liable for acts caused by employees if the employer was negligent or reckless in employing improper persons in work involving risk of harm to others or by failing to prevent negligent or torturous conduct by those employees. An employer breaches its duty if it knows or should have known of facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in light of the particular work to be performed. The cornerstone of such a claim is that the employee will act in a certain way and that the employee does act in such a way.

It may be difficult, however, to determine whether persons are at risk due to the employee's presence at the workplace. For example, the employee may have engaged in the conduct many years ago. Moreover, the employee's work history with you may be unblemished. Perhaps the employee's offenses related to sex crimes were with minors with whom (s)he has had a close relationship. Does that mean that adult employees with whom the employer has no social contact are not at risk?

These are difficult questions to answer. Unfortunately, the law is not developed sufficiently to provide adequate instruction to employers. We recommend that you involve legal counsel and other professional assistance before taking action.

We also recommend that employers conduct thorough background investigations. It is our experience that these employees often enter the workforce undetected because someone failed to review and verify the employee's history on an employment application. Criminal background checks, when properly conducted, can also disclose an employee's past bad acts. Unfortunately, most background investigation companies rely primarily on web-based searches only. In most cases, such searches are inadequate.

This is not intended as a complete analysis of the subject matter, or legal advice on any specific matter. Contact us if you have specific questions or need further assistance.