II. EMPLOYER INVESTIGATIONS

A. RECORDS EMPLOYERS CANNOT OBTAIN

Neither an individual’s present employer nor a possible future employer can obtain information about her from any of the following sources without the individual’s consent:

- Insurance companies. (Insurance Code sections 791–791.26.)
- Public or private schools (student records). (Education Code section 49076; 20 U.S. Code section 1232d.)
- Junior colleges, colleges, or universities (student records). (Education Code sections 76240–76243.)
- Addiction treatment programs. (Health and Safety Code sections 123125(a), (b), 123135; Civil Code section 1798.24.)
- Providers of mental health services. (Civil Code section 56.10.)
- Any person or agency that has the results of an employee’s or applicant’s HIV antibody or HIV test. (Health and Safety Code section 120980.)

In addition, an employer cannot seek, possess, or use any information about the following:

- Arrests for which the individual was not convicted, for instance, when the case is dismissed, there is a verdict of not-guilty, or the district attorney informs the arresting agency that the case will be dropped. (Labor Code sections 432.7, 432.8.) Exception: If the individual is out of custody on bail or where bail is not required at the time the information is sought, employers may seek and obtain information about that arrest. (Labor Code section 432.7(a).)
- Marijuana convictions that occurred more than two years in the past. (Health and Safety Code section 11361.5.)
- Arrests that led to an individual’s participation in a diversion program. (Labor Code section 432.7.)

Prohibited access to police records is discussed in detail later in this chapter.

Enforcement: File a complaint with the local district attorney. File a civil suit. An employer who gives an individual’s photo to a third party for purposes that could be harmful to the employee, or who fails to take all reasonable steps to prevent a violation of these laws, is guilty of a misdemeanor. (Labor Code section 1052.)

An employer cannot submit an applicant’s or employee’s fingerprints to local law enforcement officials in order to obtain criminal information (10 Opinions of the California Attorney General 19 (1947).), except in the situations listed later in this section.

Enforcement: File a complaint with the local district attorney. File a civil suit. An employer who gives an individual’s photo to a third party for purposes that could be harmful to the employee, or who fails to take all reasonable steps to prevent a violation of these laws, is guilty of a misdemeanor. (Labor Code section 1052.)

In a civil suit against the employer, an applicant or employee may be awarded triple damages. (Labor Code section 1054.)

Exceptions: Protected information can be released if an applicant or employee provides a signed written authorization allowing his employer or someone else to gain access to that information. If the applicant signs a release as part of the hiring process, he is still entitled to protect his privacy later. To do so, the individual must send a letter to the agencies that have his personal information for example, schools, insurance companies, credit agencies, stating that he is canceling any prior authorizations for release of those details. Once the agency receives this cancellation, it cannot release the individual’s information to the employer.

B. EMPLOYEE PHOTOGRAPH OR FINGERPRINTS

Under California law, a prospective employer may require an applicant’s photograph and fingerprints for the employer’s own use. (Labor Code section 1051.) However, an employer cannot require an individual to be photographed or fingerprinted for the use of a third person (with certain exceptions listed below) if the photos or prints might be used in a way that could be harmful to the employee. For instance, an employer is prohibited in most circumstances from turning employee photographs or fingerprints over to other employers in order to prevent future employment, or to law enforcement agencies unless they are given out pursuant to a subpoena or court order. (Labor Code sections 1051, 1052.) Nor may an employer require an individual to be photographed or fingerprinted by any police department or other third party. The employer, not the applicant or employee, must pay the costs of photos and fingerprints. (Labor Code section 401.)

An employer cannot submit an applicant’s or employee’s fingerprints to local law enforcement officials in order to obtain criminal information (10 Opinions of the California Attorney General 19 (1947).), except in the situations listed later in this section.

Enforcement: File a complaint with the local district attorney. File a civil suit. An employer who gives an individual’s photo to a third party for purposes that could be harmful to the employee, or who fails to take all reasonable steps to prevent a violation of these laws, is guilty of a misdemeanor. (Labor Code section 1052.)

In a civil suit against the employer, an applicant or employee may be awarded triple damages. (Labor Code section 1054.)
Exceptions: Certain employees are not covered by these protections:

- Workers in industries or professions that legally require federal or state licensing, such as the gaming industry or private patrol operators. (Business and Professions Code sections 19865, 7583.9.)
- Employees of banks and savings and loan companies. (Finance Code sections 550, 6525.)
- Anyone required to be fingerprinted by federal law (for example, securities brokers). (15 U.S. Code section 78q(l)(2).) (Labor Code section 1057.)
- Licensed childcare providers (including any adult who lives in a childcare facility or a home offering childcare). (Health and Safety Code sections 1596.603, 1597.54(c); 22 California Code of Regulations sections 101169(d)(13), 101170(b), (d).)
- Schoolteachers, employees in public recreation programs, and employees of entities doing business with school districts who have contact with students. (Education Code sections 44237, 10911.5, 44830, 44340, 45125.1.)

C. LIE DETECTOR TESTS

1. Right to Refuse to Take the Test

California law prohibits employers from requiring polygraph, lie detector, or similar tests as a condition of employment or continued employment. If an applicant or employee voluntarily submits to a lie detector test, the employer must, before the test begins, provide the individual with written notice about his rights, including the right to refuse to take the test. This law originally did not cover public employees, but the California Supreme Court struck down that exclusion. State and local public employees are now covered by the California law that prohibits employers from forcing employees to take lie detector or similar tests. (Labor Code section 432.2; Long Beach City Employees Association v. City of Long Beach (1986) 41 Cal.3d 937.) Additionally, California law prohibits polygraph testing of police officers and discipline of officers who refuse a test. (Public Safety Officers' Procedural Bill of Rights Act, Government Code section 3307.)

There is a similar federal law. (29 U.S. Code sections 2001–2009.) However, this law does not apply to federal, state, or local government employees. (29 U.S. Code section 2006(a).) It is unlawful under federal law for an employer to use, accept, refer to, or ask about the results of any lie detector test an applicant or employee has taken, without the employee's permission. An employer cannot dismiss, discipline, or discriminate against an individual for refusing to take a lie detector test. It is illegal for an employer to make even veiled threats or to punish an individual in any way for refusing to take the test or for exercising his rights under this law.

2. Restrictions if an Individual Consents to the Test

If an applicant or employee agrees voluntarily to take a lie detector test, his current or prospective employer must provide a written notice for the individual to read and sign. The notice must explain how the testing device works; how the testing results can be used; and the individual's rights under the law, including the right to refuse to take the test and not be punished for doing so, the right to stop the test at any time, and the right to be asked questions in a way that is not degrading or unnecessarily intrusive. (Labor Code section 432.2.) Before a polygraph test begins, the examiner must read the questions aloud to the test subject. It is illegal for the examiner to use any question that was not read to the test subject in advance. (29 U.S. Code section 2007(b)(2)(E).)

3. Potential Risks From Consenting to the Test

If, in spite of the law, an applicant or employee is asked to take a test, it is advisable for her to refuse, especially if she already has the job. There are serious risks involved in taking a polygraph test. If an employee agrees to the test and the machine operator decides that she is lying, the employer can fire the employee. Even if the individual is a job applicant, it is best not to take the test. It is illegal for an employer to suggest that only those who take the test will be hired. An employer who hires on that basis is guilty of a crime and may be sued. (Labor Code sections 432.2, 432.7(c), 433, 2698-2699.5; 29 U.S. Code section 2005(c).)

An applicant who chooses to take the test should pay careful attention to the questions asked. If asked illegal questions, the individual does not have to answer or take any action that may be against the law. (For a description of the