

Question & Answer Summary

November 19, 2009 Webinar

Conducting Successful Workplace Investigations: A Guide to Doing It Right

On November 19, 2009, Miller Law Group presented a webinar on Conducting Successful Workplace Investigations: A Guide to Doing It Right. We examined the legal requirements and recent developments that impact the range of employment investigations from hiring through termination, including consumer reports, drug testing, verification of employment eligibility, sexual harassment and other misconduct investigations, and more. The following are answers to frequently asked questions by webinar attendees.

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Q. IS IT LEGAL FOR HUMAN RESOURCES OR HIRING MANAGERS TO LOOK AT CANDIDATES ON FACEBOOK, TWITTER, AND OTHER SOCIAL NETWORKING SITES, SO LONG AS THE SITES ARE "PUBLIC"?

A. Generally, it is legal for employers to check up on applicants on public pages of Facebook, Twitter, and similar sites. However, employers should keep a few points in mind. First, never access private pages without authorization or by using subterfuge, as doing so could lead to lawsuits for invasion of privacy or violation of state or federal laws, such as the Stored Communications Act. Also, even though sites or web pages may be public does not mean that all the information is fit for employer use. For example, an employer that uses information about a person's race, sexual orientation, or political activities could get sued for discrimination or violation of California's off-duty protection statute. Even if the employer does not base an employment decision on this knowledge, the mere fact that it was aware of an applicant's membership in a protected class or activity could open the door to discrimination claims.

Q. ARE EMPLOYERS REQUIRED TO APPLY BACKGROUND CHECKS CONSISTENTLY, SUCH THAT IF THE EMPLOYER CONDUCTS A BACKGROUND CHECK ON ONE APPLICANT IT SHOULD DO THE SAME FOR ALL?

A. While there is no law that specifically requires employers to conduct background checks consistently, once an employer decides to use background checks the failure to do so consistently can put the employer at risk for legal claims, particularly for discrimination. As a result, the best practice is to conduct background checks consistently for all applicants for a job classification. For example, an employer might want to perform background checks on candidates for safety-sensitive positions, but not for office/administrative jobs.

Q. I UNDERSTAND THAT COMPLETED I-9 FORMS SHOULD BE KEPT IN A FILE SEPARATE FROM PERSONNEL RECORDS. DOES THIS ALSO APPLY TO I-9 FORMS FOR TERMINATED EMPLOYEES?

A. Yes. I-9 forms, whether for current or former employees, should be kept together, separate from personnel files. The key reason for this is that if you are audited by Immigration and Customs Enforcement (ICE), you will have just 72 hours to produce the completed I-9 forms for inspection. If the forms are in individual employee personnel files, chances are you will be unable to retrieve them in a timely manner.

Q. WE USE E-VERIFY. ARE WE REQUIRED TO NOTIFY THE NEW HIRE THAT WE ARE USING E-VERIFY OR OBTAIN THEIR SIGNATURE ON ANY FORM OTHER THAN THE I-9 FORM?

A. Employers that use E-Verify must post a workplace notice, in English and Spanish, informing employees and applicants of the employer's use of E-Verify. In addition, E-Verify employers must post the Right to Work poster issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices. Once you have registered for E-Verify, both posters are available from the Online Resources section of the E-Verify website (www.uscis.gov/everify). Both notices must be clearly displayed in plain view at your hiring site(s), in order to inform prospective and current employees that your company participates in E-Verify. Note that if you do not have a suitable location for the posting – for example, you do not have specific hiring sites – you should ensure that all prospective employees receive the notices with their application materials, in addition to posting them in the most appropriate location you do have for viewing by potential and current employees.

Q. IS EVERY EMPLOYER REQUIRED TO COMPLY WITH THE GINA POSTER OR ARE THERE ANY EXCEPTIONS?

A. Employers with 15 or more employees are required to post the new Equal Employment Opportunity Is the Law Poster, available from the Equal Employment Opportunity Commission at <http://www1.eeoc.gov/employers/poster.cfm>. The poster was recently updated to include information on the Genetic Information Non-Discrimination Act (GINA) and the revised Americans with Disabilities Act (ADA). Employers with fewer than 15 employees are not covered by GINA or the ADA and are not subject to this posting requirement.

Q. IN CONNECTION WITH HARASSMENT AND OTHER MISCONDUCT INVESTIGATIONS, IS IT SUGGESTED THAT THE EMPLOYER OR OTHER INVESTIGATOR INTERVIEW ALL WITNESSES THAT THE ACCUSED IDENTIFIES? IF SO, IS IT PROBLEMATIC IF THE INVESTIGATOR, APPLYING HIS OR HER JUDGMENT, DETERMINES THAT CERTAIN IDENTIFIED WITNESSES DO NOT NEED TO BE INTERVIEWED?

A. The best practice is to interview all witnesses identified by the accused and the victim. However, investigators should always use their judgment regarding which witnesses to interview, as there might be additional witnesses not identified by the accused or victim, or the list of witnesses might be too lengthy and unrealistic. In any case, the investigator should be certain to document his or her legitimate reasons why an individual identified as a witness was not interviewed. The investigator should also keep in mind that additional witnesses might surface once the investigation is underway.

Q. IS IT ALWAYS BEST PRACTICE TO USE AN INDEPENDENT THIRD PARTY INVESTIGATOR? CAN A MEMBER OF HUMAN RESOURCES EVER BE AN IMPARTIAL INVESTIGATOR?

A. The key factor in selecting an investigator is to ensure that the individual is well-trained, neutral, objective, and not in any way implicated in the complaint. Depending on the circumstances, an in-house investigator could meet these qualifications. It is also important to ensure that the individual, whether in-house or outside, has knowledge of company policies, knowledge of the relevant law, and good interviewing skills. Finally, because the investigator could be called upon to testify if the complaint mushrooms into a lawsuit, he or she should be someone who is credible and has “jury appeal.”

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar and should not be considered legal advice.