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LEAGUE OF CALIFORNIA CITIES 2021 FIRE CHIEFS LEADERSHIP SEMINAR

Recruiting, Hiring and Promoting the Right People for Your Agency

12/8/2021

PRESENTED BY:

Geoffrey S. Sheldon

Recruiting, Hiring, and Promoting the Right People for Your Agency

League of California Cities 2021 Fire Chiefs Leadership Seminar | December 8, 2021

Presented By: *Geoffrey S. Sheldon*

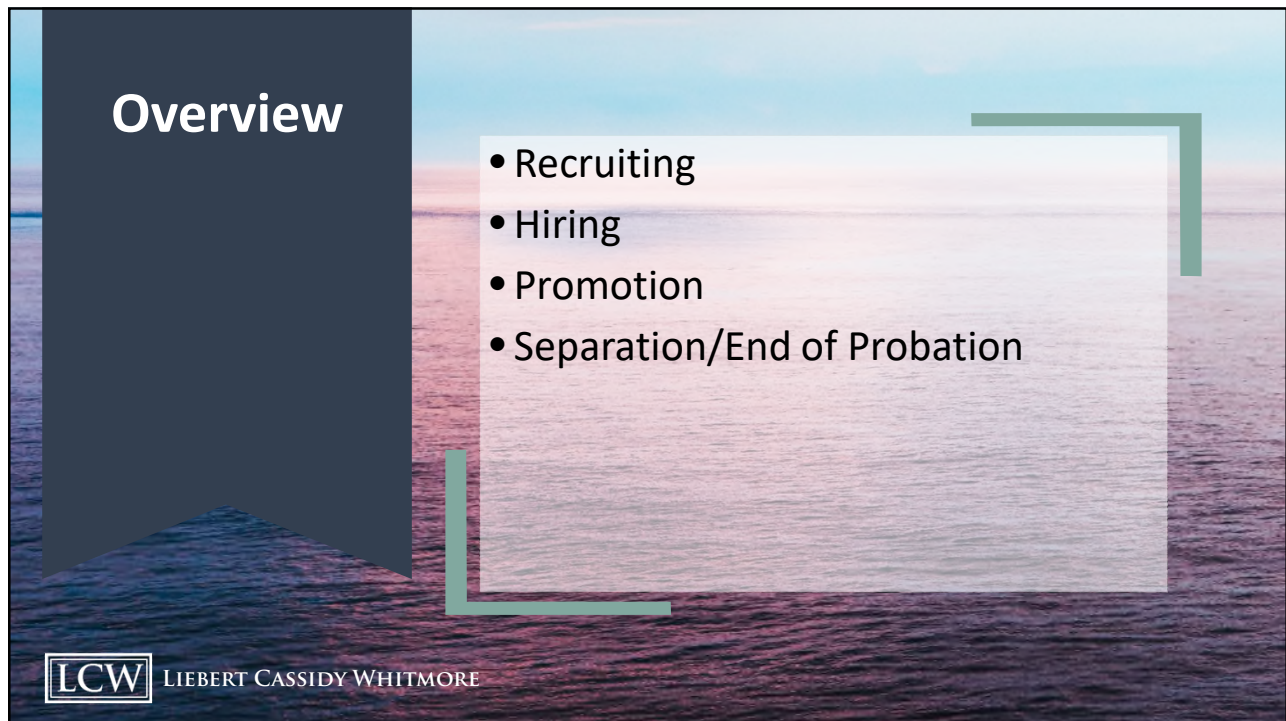


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Recruiting, Hiring, and Promoting the Right People for Your Agency

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Overview

- Recruiting
- Hiring
- Promotion
- Separation/End of Probation

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Recruiting, Hiring, and Promoting the Right People for Your Agency

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Recruiting



Desirable Qualities in Recruits

- Desirable qualities
 - Passion for becoming a firefighter
 - Competence/fitness
 - Judgment
 - Team player/loyalty towards agency
 - Integrity (truthful/honest)



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Recruiting a Diverse Workforce

- What about Diversity?



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Recruiting a Diverse Workforce

- Affirmative Action Pre-Prop 209
 - Generally used to describe employment practices that factor in an applicant's race/gender to correct a demonstrated, statistical underrepresentation
 - Lawful if satisfied "strict scrutiny"
 - Narrowly tailored
 - To serve a compelling state purpose
 - Described as "benign discrimination"

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Recruiting a Diverse Workforce

- Prop 209
 - Enacted by referendum in 1999
 - Prohibits “preferential treatment” on basis of:
 - Race, sex, color, ethnicity, national origin
 - In Public:
 - Employment
 - Education
 - Contracting

*Cal. Const. Art. 1, Sec. 31



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Recruiting a Diverse Workforce

- *Hi-Voltage v. City of San Jose* (2001) 24 Cal.4th 537
 - Held: Targeted recruitment = unlawful preference



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Recruiting a Diverse Workforce

- Legislative response to *Hi-Voltage v. City of San Jose*
 - Recruitment may include:
 - “Focused outreach and recruitment” of women and minorities*
 - Outreach that “should result” in diversification**

*Gov. Code 11139.6(a)(1)

**Gov. Code 11139.6(d)



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Recruiting a Diverse Workforce

- To avoid Prop. 209 challenges, recruitment must include:
 - Outreach to economically disadvantaged*

*Gov. Code 11139.6(a)(3)



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Recruiting a Diverse Workforce

- General recruitment includes*:
 - General circulation media
 - Local/regional media
 - Non-English media
 - Directed to women, minorities, low income groups
 - General-market job fairs
 - Job fairs with high participation of women/minorities
 - Personal contacts

*Gov. Code 11139.6(e)

Recruiting a Diverse Workforce

- 3 Principles for Lawful EEO Hiring:
 - Protected status of candidates is **never** a factor
 - Infusing a commitment to diversity into the hiring process does **not** involve lowering standards
 - Infusing a commitment to diversity into the hiring process **does** involve assessing candidates against job-related criteria, including:
 - Eliminating irrational (i.e., not job-related) barriers
 - Expanding/updating what is job related

Recruiting a Diverse Workforce

True or False

A public employer in California may engage in "outreach" to under-represented groups by advertising on Spanish language television stations.

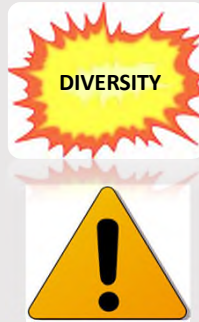
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Hiring

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Challenges in the Hiring Process



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Job Application

- Can ask typical information such as:
 - Legal name
 - Experience
 - A general question asking for an explanation of gaps in employment history
- It is VERY easy to fall into the trap of asking questions that will solicit information you are not allowed to ask until later in the hiring process
 - Vet applications with HR or legal counsel

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Salary Information

- Can ask applicant for desired salary, but...
 - California law generally prohibits employers from inquiring about or considering a job applicant's salary history information as part of the hiring process
 - This includes asking for past salary information on job application, on past salary information in making employesoliciting past salary information from references, or relying nt decisions

Background Checks

- Why Conduct Them?**
- Applicants exaggerate experience or education
 - Applicants cover up important gaps or omit problem experience
 - Applicants manipulate employment dates
 - In some cases, the law requires background checks

Background Checks

Types of Background Checks

- Reference checks
 - Former employers
 - Education verification
- Internet searches
- Review of criminal history
 - Yes, but usually only after a conditional job offer (*we'll discuss shortly*)

References

- Should solicit only information relative to employment matters
- Objective parameters such as dates of employment
- Be safe, and get the rest from a background check

“Ban the Box”

- DO NOT ASK ABOUT PRIOR CRIMINAL HISTORY
- It is unlawful under AB 218
- Blanket disqualification rules based on criminal history are now prohibited
- Requires individualized assessment of an applicant’s criminal history to see if it relates to job duties
- MUST BE **AFTER** CONDITIONAL OFFER



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Criminal History Inquiries

Obtaining criminal history:

- Available from California Attorney General or by submitting applicants’ fingerprints to DOJ
- Only if agency’s governing body approves acquisition of criminal histories in application process
- DOJ will furnish information to employer and a copy to applicant



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Criminal History Inquiries

- For most candidates, employers may not consider:
 - Arrests not resulting in conviction or no contest pleas
 - Referrals to diversion programs, convictions that are expunged or sealed
 - Most juvenile criminal history
 - Certain marijuana convictions that are more than two years old
- **FIREFIGHTERS ARE INCLUDED IN THIS GROUP!**



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Internet Searches

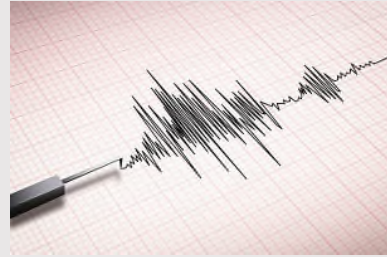
- Recommendations:**
- Verify that the information found is true and reliable;
 - Only consider information that relates to the applicant's ability to perform the job; and
 - Only consider information that could legally have been elicited from the applicant during an interview.



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Polygraph Examinations

- No legal requirement to conduct polygraph exam
- Should have articulable business justification if agency is going to require them



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Skills Testing

- Scored tests may be used to determine the qualifications of a person for a job
- Types of tests:
 - Physical agility tests
 - Typing tests
 - Written examinations
- Medical testing...WAIT!



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Skills Testing

- *Ernst v. City of Chicago* (7th Cir. 2016) 837 F.3d 788
 - Female applicants who had applied for paramedic positions with city fire department and were not hired because they failed physical abilities test brought gender discrimination action asserting claims for disparate treatment and disparate impact
 - **City failed to show** that its physical skills testing was **job-related** and consistent with **business necessity**
- *Lewis v. City of Chicago* (2010) 560 U.S. 205
 - African-American applicants for city firefighter jobs could proceed with class action lawsuit alleging that written test required by city had **disparate impact** on African-American applicants

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Conditional Offer of Employment

- “Conditional Offer of Employment”
 - Bona fide offer to fill actual job position, contingent on satisfying certain conditions
- LCW advises:
 1. Make the conditional offer of employment
 2. Do criminal history review (unless exception applies)
 3. Conduct drug/alcohol test and medical examinations (*where applicable*)

Under ADA and FEHA, medical examination should not occur until all non-medical information has been analyzed

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Pre-Employment Medical Exams

- When can an employer require a “medical examination”?
 - Conditional Job Offer has been made
 - All employees in that classification are required to submit to a medical exam
 - Exam is job-related and consistent with business necessity
 - Drug testing limitations are met
 - Results are in a separate/confidential file

Pre-Employment Medical Exams

- What is the permissible scope of a medical exam?
 - There is no equivalent of Government Code § 1031(f) for firefighters
 - Medical examinations must be job related and consistent with business necessity
 - Each component of medical exam should be narrowly tailored and justified by the needs of the position
 - Psychological exams are considered medical exams so follow same rules

Pre-Employment Medical Exams

- What if an applicant fails the medical exam?
 - Do not forget to engage in the interactive process
 - *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696
 - Duty to engage in interactive process extends to “pre-probationary” employees in employer’s academy; city could not deny plaintiffs reasonable accommodation in the form of light-duty reassignment that had been offered to prior injured recruits

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Promoting



Typical Promotion Tools

- Tools commonly used for promotions:
 - Application
 - Skills testing
 - Applicant interview(s)

MAKE SURE TO FOLLOW ALL APPLICABLE AGENCY
HIRING RULES AND PROCEDURES

Best Practices for Promotions

- Be cognizant of discrimination and retaliation claims
 - Management should stay at arms length until the end (e.g., the less involved in the process before the certified eligibility list the better)
 - Ensure consistency in hiring process
 - Be careful to look at applicant as a whole and not disqualify based on one isolated factor
 - While useful, be skeptical of peer reviews
 - Look for “grade inflation” in performance evaluations
 - Keep written documentation on all applicants (e.g., document **WHY** employee promoted over others)

Failing Promotion

- Demotion vs. failure of promotion
 - Demotion requires due process
 - Promotional period (including ability to extend promotion) depends on agency's rules

Failing Promotion

- *Conger v. County of Los Angeles* (2019) 36 Cal.App.5th 262
 - Employer did not violate POBR when it rescinded probationary lieutenant's probationary promotion based on investigatory findings that lieutenant had failed to report a use of force several months before being promoted to the probationary position
 - Rescinding promotion based on alleged conduct occurring before promotion was NOT a demotion NOR a "denial of promotion on grounds other than merit" that would have entitled him to an administrative appeal

Failing Promotion – Best Practices

- Give the probationer the opportunity to succeed or fail
- Contemporaneously document all performance or misconduct issues
- Provide a name-clearing hearing if release from probation is for stigmatizing reasons (e.g., harassment of a subordinate)



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Thank You!

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