



AUGUST 2008

MEGAN'S LAW LOOPHOLE GIVES PREDATORS AN ADVANTAGE

AS SEEN IN THE LOS ANGELES DAILY JOURNAL

By John D. Alessio, Esq.
*Procopio, Cory, Hargreaves & Savitch
LLP*

For more than 50 years, California has required sex offenders to register with local law enforcement. In 1995, the implementation of the Child Molester Identification Line made information on the whereabouts of sex offenders available to the public. However, the information was only available in person at police stations and sheriff's offices or by calling a 900 toll number. In 2004, California Megan's Law was passed, providing the public with access to detailed information on registered sex offenders through the Internet.

The Megan's Law Web site (www.meganslaw.ca.gov) is very informative and easy to navigate. In a matter of seconds, one can enter a person's name and discover if that person is a registered sex offender. While entering the Web site, there is a Megan's Law disclaimer that must be read and agreed to before accessing the information. Under the section describing "Legal and Illegal Uses" of the Web site, it warns "Anyone who uses this information to commit a crime or to harass a registered offender or his or her family is subject to criminal prosecution and civil liability." What it fails to mention is that deep down inside this multi-paged, single-spaced statute, there is a prohibition of the use of this information by employers.

Through an unfortunate loophole, Megan's Law, enacted to protect the public, can actually be used by sexual predators to secure employment. In effect, this law provides a convicted child molester more rights than a



JOHN D. ALESSIO

non-molester employee.

The Law

Specifically, Megan's Law states, "use of any information that is disclosed pursuant to this section for purposes relating to any of the following is prohibited: ... [among other categories] Employment." Penal Code Section 290.46(1)(2)(E), (emphasis added).

That is all it says - an all-encompassing prohibition of use of information found on the Megan's Law Web site in "Employment."

Megan's Law does have some exceptions. Information found on the Web site can be used "to protect the public from risk" and "pursuant to Labor Code 432.7." Labor Code 432.7 speaks mainly to what you can ask an "applicant." It does reference that an employer can use the fact of a "conviction" in determining any condition of employment, including termination. However, this Labor Code is worded in the negative and most cases and legal practice guides

have interpreted this Labor Code to be applicable to the hiring process only.

So what can employers do if they find out from the Megan's Law Web site that their employee is a sexual predator months or years after they have already been hired? Per Megan's Law, nothing.

Other Laws

California is an at-will employment state. The California Labor Code allows employers to terminate employees for any reason or no reason at all. There are common law and statutory protections prohibiting employers from taking adverse actions against employees based on race, gender, age and other protected categories. By virtue of Megan's Law, sexual offenders have now seemed to take on a quasi-protected classification.

Worse yet, employers in many respects are legally obligated to protect the public. Indeed, California recognizes a cause of action in tort for negligent hiring, training and supervision. If an employer fails to use reasonable care to discover an employee's unfitness for employment in a particular job, they can be liable to third parties.

Pick Your Poison

If an employer is in the unfortunate position of finding out a current employee is a registered sex offender by referencing the Megan's Law Web site, they will be placed in a difficult position.

Under this situation, the employer is going to have to decide which lawsuit they would rather face: a claim by a

sexual predator over a technical statutory violation resulting in the loss of a job; or, a claim by an innocent young child or coworker who was physically abused and most likely mentally distraught for the rest of his/her life by the hands of their employee.

Normally, this is an easy decision but, unfortunately, one that has unavoidable legal exposure for the employer.

The Courts

Terminated sexual predators are filing claims for wrongful termination against their employers, ironically using Megan's Law as the legal grounds to secure employment. These claims are attractive to plaintiffs' attorneys because attorney fees are statutorily available as an element of damages. In my experience, the courts simply cannot reconcile the Labor Code 432.7 exception with the general proposition under Megan's Law stating use of the Web site information is "prohibited" with regard to "Employment." The courts are reluctantly unable to dispose of these matters at the outset by way of motion and are instead forced to leave the decision for a jury to decide whether termination was warranted to "protect the public from risk." This means tens of thousands of dollars to the employer in defense costs, which normally translates into the disdainful nuisance value settlement. Hence, a windfall to the sexual predator that is not otherwise available to other employees.

What to Do

At a minimum, the Megan's Law Web site should warn employers of this nuance in the law when it summarizes the "Illegal Uses."

The statute should be changed. The prohibition of use of the Web site in "Employment" should be taken out of the statute altogether. If employers can legally gain this information through public records (i.e., physically checking the court files),

then why shouldn't they be allowed to simply check the Megan's Law Web site? This Web site is nothing more than a quicker and easier way of obtaining the same information.

Certainly, there is a balance that needs to be struck. Studies confirm that sexual offenders who maintain stable employment are less likely to commit another offense in the future. However, an all-encompassing prohibition of use of this information by employers is not the answer.

Protections for the Predators

The Web site is continuously updated and not all sex offenders are posted on the Web site. The Web site is reserved only for those convicted of the most serious sexual offenses and/or repeat offenders. There are multiple avenues for a sexual predator to petition to be excluded from the Web site. As of Dec. 29, 2005, 3,696 registrants applied for and were granted exclusion, while 4,068 registrants had applied for and were denied exclusion, as required by the statute. In 2005, there were approximately 15 legal filings by registrants challenging the denial of their applications for exclusion from the Web site. All but one of them were resolved within a few months and in each case, the challenge was rejected and the denial of exclusion was found to be legal. The legal process is moving quickly and accurately for sexual offenders. There are plenty of protections for the sexual predators already built into the Megan's Law statute. Not to mention, the burden of proof being "beyond a reasonable doubt" in the criminal charge against the sexual predator from the outset.

Government Assistance

Among other assistance programs, the Center for Sex Offender Management was created by the U.S. Department of Justice. This organization's purpose is to protect the public by helping sex offenders reintegrate into society. The center acknowledges that sex offenders should not hold jobs that give them

authority over potential victims (including coworkers or subordinates), or work in service industry jobs that give them access to vulnerable populations, or in settings that may be near a school or playground. They recommend open and candid discussions between the employer and employee about the employee's status as a registered sex offender and accommodations therefore, if necessary. The center will assist with the supervisory burdens and accommodations that may be necessary for such employment. There are financial incentives, such as tax credits and federal bonding authorized by the Small Business Job Protection Act available to employers whom hire sex offenders. The government assistance is in place for the employer and sexual offender employee. The problem lies with the person who enters into the workplace without disclosing his or her status as a registered sex offender. It is this sexual offender who is in denial, and most likely, the exact type of person who poses a high risk.

This statute needs to be reviewed by the Legislature. Based on the current language of Megan's Law, the sexual offender is encouraged to hide his or her status as such from employers and later can use that status to secure employment in a manner other law-abiding citizens cannot. The Legislature should be promoting full disclosure up front by sexual offenders and an employer's routine policing of the workforce with the desire to protect the public, not creating laws forbidding such conduct.

John D. Alessio is senior counsel with the San Diego law firm of Procopio, Cory, Hargreaves & Savitch. He can be reached at jda@procopio.com or (619) 525-3899.