

The use of the California Sexual Registration listing, commonly known as Megan's Law, is widespread among employers. However, there is a little known provision in California that may actually limit an employer's legal use of that information in some situations.

The Megan's Law was first passed in 1996. Originally, information on sex offenders that register under California Penal Code Section 290 was only available by personally visiting police stations and sheriff's offices, or by calling a 900 number. The website at www.meganslaw.ca.gov was established by the California Department of Justice pursuant to a 2004 California law for the purpose of allowing "the public for the first time to use their personal computers to view information on sex offenders required to register with local law enforcement under California's Megan's Law. " The purpose of Megan's law is summarized on the web site:

California's Megan's Law provides the public with certain information on the whereabouts of sex offenders so that members of our local communities may protect themselves and their children. Megan's Law is named after seven-year-old Megan Kanka, a New Jersey girl who was raped and killed by a known child molester who had moved across the street from the family without their knowledge. In the wake of the tragedy, the Kankas sought to have local communities warned. The California site allows anyone to search the database by a sex offender's specific name, obtain ZIP Code and city/county listings, obtain detailed personal profile information on each registrant, and use a map application to search their neighborhood or anywhere throughout the State to determine the specific location of any of those registrants on whom the law allows us to display a home address. Megan's law contains a provision which prohibits the information to be used when it comes to insurance, loans, credit, employment, education, housing or accommodation or benefits or privileges provided by any business. California Penal Code Section 290.4(d) (2).

However, there is an exception. According to California law, "A person is authorized to use information disclosed pursuant to this section only to protect a person at risk." California Penal Code Section 290.4(d) (1).

The problem for employers that want to use this information: There is no legal definition for the term "person at risk." Neither the California Penal code, the legislative history of the section or the Megan's law website defines a "person at risk." Until a court provides a definition, employers are well advised to apply a common-sense approach by looking at risk factors associated with the nature of the job. For example, there is a widespread industry agreement that vulnerable individuals are at risk, such as the young, the aged, the infirmed, or the physically or mentally disabled. In addition, people inside their own home are likely to be at greater risk, since it is harder to obtain help, so home workers may be considered a population that works with people at risk. Another category is workers that operate under some sort of badge or color of authority or who wears a uniform. In that situation, a person may let their guard down. Until a court makes a clear decision, employers should make an effort to determine if there is a good faith belief that it is reasonably foreseeable that a member of a group at risk could be negatively impacted if a sexual offender was hired. Of course, if the underlying criminal record is discovered and otherwise meets the many complicated rules governing the reporting and use of criminal records in California, then the "group at risk" analysis is not needed, and the employer handles it like any other criminal record.

There are two other challenges for California employers using the Megan's law website:

First, it is possible that a person may be registered as a sex offender, but their crime is beyond the 7 year California reporting provisions that restrict what a Consumer Reporting Agency can report. Although not yet tested in the Courts, the industry standard is for a screening firm to report the listing, on the basis that the background firm is reporting on the offender's current status as a registered sexual offender.

The other issue is that there are large numbers of sex offenders that either do not register or abscond from the jurisdiction(s), or do not re-register. The Safe Hiring Manual, by ESR President, Lester S. Rosen, reported on studies suggesting a significant number of sex offenders did not have current registration and authorities have lost track of their whereabouts.

The bottom line: Where an employer is hiring an applicant for a position where it is foreseeable that there would be contact with members of groups at risk, then the sexual offender database search can be valuable. However, employers should keep in mind that there are limitations that have yet to be fully defined by courts or the legislature, and the databases may not be up-to-date or 100% accurate.