Navigating Legal Restrictions in the Hiring Process – 7 Problems to Avoid

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In the search for qualified candidates, employers are increasingly turning to new and improved screening methods – from advanced background checks to emerging employee selection tests to online social media information to artificial intelligence and other analytic tools. At the same time, local and state legislatures continue to enact new laws governing various aspects of the hiring process.

As methods and laws evolve, what are the significant pitfalls employers must navigate during the hiring process? Where are we seeing increased scrutiny from regulators and plaintiffs' attorneys? This session is designed to provide an overview of the hiring process, discuss application of old laws to new methods, identify areas where legislatures are most active, and highlight common problems we see employers make when recruiting.

1. RECRUITING

a. Jumping Into Recruiting Trends Without Analyzing Legal Risks

i. Social Media and Targeted Recruiting

Employers are increasingly turning to social media as a way to promote job openings in a cost-effective and targeted manner. Human resource professionals and recruiters can quickly, easily, and affordably post open positions on social media sites and reach a significant number of potential applicants. Although the speed and efficiency of recruiting through social media makes this a popular choice, employers face risks when relying on social media for recruiting efforts without carefully analyzing the legal issues associated with these tools and providing guidelines for recruiters and hiring managers who utilize them.

Even though the demographics of those using social media has continued to evolve, certain groups of potential applicants may not use social media regularly and the demographics can differ widely depending on the social media platform. For example, it is likely that younger workers use social media more frequently than older workers.[1] Similarly, those of low socio-economic statuses may also not have the same level of access to social media as those of higher

[1] In January 2018, 69% of U.S. adults used at least one social media site. However, 88% of adults age 18-29 use at least one social media site, while only 64% of adults age 50-64, and 37% of adults over age 65, use at least one social media site. *See Social Media Fact Sheet*, Pew Research Center, http://www.pewinternet.org/fact-sheet/social-media/.

socio-economic statuses.[2] These traits are often directly or indirectly associated with protected characteristics, and using social media as the primary or sole method of recruitment may disproportionately exclude certain classes of applicants from an employer's search.

Existing employees often also leverage their existing social media networks to promote job openings. Although this method of recruiting can save an employer time and money, by using an existing employee's base of contacts, an employer can perpetuate discrimination and target recruitment efforts to those potential applicants who are similar to those employees already in the workforce, neglecting those applicants from other diverse populations. In order to minimize risks associated with these practices, employers should carefully consider how social media recruiting fits into an overall recruitment process, and ensure that it is soliciting applicants from a wide range of sources to avoid any potential discrimination claims resulting from its recruitment methods.

Social media sites have also offered users the ability to promote advertisements, including job postings, to certain users based on demographic information. For example, an employer could promote a job to people living in a certain geographic area, people within a certain age bracket, or people who have expressed an interest in a particular topic. Some of the targeted promotion criteria directly (in the case of age or gender) or indirectly (in the case of geographic area, interests) will exclude applicants of a particular protected characteristic, and can therefore present facts ripe for a discrimination claim. Targeting job postings to certain groups may allow an employer to more effectively market the open position to those who are likely to be qualified and interested in the job. However, this method of recruiting has faced extreme scrutiny because of the potential ability of employers to restrict those who belong to certain classes from seeing the postings. Although, certain social media platforms have recognized this issue and are implementing processes to prohibit discriminatory advertising for employment, their systems are far from fool-proof, and even well-intended recruitment efforts can ultimately have a discriminatory impact, or at least be viewed to have such an impact.

Each of these practices has the potential to create both disparate treatment and disparate impact claims of discrimination. Disparate treatment claims of course arise when a recruiter specifically targets candidates in a particular age range, race or gender. Disparate impact claims can arise when the targeted demographic is correlated with users' gender, race, religion or other protected category status. If a plaintiff identifies a specific employment practice and offers statistical evidence sufficient to show that the practice in question has disproportionately caused the exclusion of applicants of a protected group, a *prima facie* case of discrimination can be established. The burden then shifts to the employer to demonstrate that the screening method is "job related for the position in question and consistent with business necessity." If the employer satisfies this requirement, the burden shifts back to the plaintiff to show that an equally valid and less discriminatory practice was available that the employer refused to use. 42 U.S.C. § 2000e-2(k); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709 (7th Cir. 2012); *Grant v. Metro. Gov't of Nashville & Davidson Cnty.*, 446 F. App'x 737 (6th Cir. 2011).

[2] According to the Pew Research Center survey, 77% of adults earning $75,000 or more use social media; only 63% of adults earning less than $30,000 use social media. *Id.*

Laws regarding recruiting practices have not caught up to the widespread world of social media. Employers can expect updates to legal requirements as these issues make their way through the legislative and litigation process.

ii. Litigation Based On Recruitment of "Youthful" Candidates

In the light of the world of online recruiting, employers face scrutiny for seeking youthful applicants, not only in the methods by which they recruit applicants for employment, but also in the content of the recruitment efforts. Employers across the country are facing claims from applicants or classes of applicants for the manner in which their recruiting efforts target young applicants, at the exclusion of older workers.
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Currently, a proposed nationwide collective action is pending against PricewaterhouseCooper LLP (PwC) in California. In that case, a group of job applicants alleges PwC discriminates in hiring in mid-level positions and below in favor of younger workers. *Rabin, et al v. PricewaterhouseCoopers LLP*, 16-cv-02276 (N.D. Cal.). The plaintiffs cite to a variety of PwC practices that have the effect of screening out older workers, such as recruiting for open positions on its website, through social media, and during college campus visits.

A similar claim has been pending against Google Inc. since 2015. A class of applicants over the age of 40 has been conditionally certified and allowed to proceed with ADEA disparate impact and disparate treatment claims against Google, alleging that Google's policies and practices favor younger workers, and that Google intentionally discriminated against qualified applicants because of the applicants' ages. *Heath v. Google Inc.*, 15-cv-01824-BLF (N.D. Cal.). These cases highlight a growing trend of age discrimination claims raised against the recruitment efforts of employers in various industries. *See also Villarreal v. R.J. Reynolds Tobacco Co., Pinstripe, Inc., CareerBuilder, LLC*, 806 F.3d 1288 (11th Cir. 2015) (resume screening criteria correlated to age could give rise to disparate impact claim under the ADEA), *vacated en banc on other grounds* 839 F.3d 958 (11th Cir. 2016).

2. CRIMINAL HISTORY AND OTHER BACKGROUND INFORMATION

a. Using Applicant Criminal History Information Without Complying with Applicable Law

Employers continue to rely on criminal and financial history information regarding applicants for employment to screen potential employees. Information related to criminal history, in particular, is collected through applications for employment and background check reports. Despite the relative ease in accessing criminal and financial history information regarding applicants for employment, several legal issues can arise from the process of gathering this data.

i. "Ban-the-Box" Trends

State legislators continue to pass laws restricting employers from requesting criminal history information during the hiring process. Dubbed "ban-the-box" laws, these laws typically

include limitations on asking the previously common question on employment applications as to whether an applicant has ever been convicted of a crime. However, many of these laws go further to prevent employers from requesting any criminal history from an applicant, at least at the initial stages of the hiring process. For example, Minnesota's "ban-the-box" law prohibits employers from asking an applicant about criminal history information prior to an interview, or if no interview will be conducted, prior to a conditional offer of employment being made. Minn. Stat. § 364.021.

Numerous states and some cities now have "ban-the-box" legislation in place. For example, among other locations, the following states prohibit private employers from asking for criminal history information on an employment application: Arizona (Exec. Order 2017-17), California (Cal. Gov. Code § 12952), Connecticut (Conn. Gen. Stat. § 31-51i), Hawai'I (Haw. Rev. Stat. § 378-2.5), Illinois (820 Ill. Comp. Stat. § 75), Massachusetts (Mass. Gen. Laws ch. 151B), New Jersey (N.J. Stat. Ann. § 34:6B-11), Oregon (Or. Laws Ch. 559), Rhode Island (R.I. Gen. Laws § § 28-5-7), Vermont (21 V.S.A. § 495j), Washington (HB 1298). Certain employers in California are also specifically prohibited from requesting information related to juvenile criminal history and convictions related to marijuana use. Cal. Gov. Code § 12952.

ii. Fair Credit Reporting Act Requirements

Employers continue to face scrutiny regarding their compliance with the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.,* particularly as it relates to hiring practices. In the hiring context, the FCRA requires employers to comply with a strict process for obtaining consent from and providing notice to applicants prior to obtaining a background check from a consumer reporting agency, which includes background vendors. If the employer learns information through a background check and wishes to take an adverse action, in whole or in part, based on such information, the employer must provide advance notice to the applicant that the employer is considering not hiring the applicant based on the information in the background report, allow the applicant a reasonable opportunity (at least five days) to review and dispute the information contained in the background check report, and provide a final notice to the applicant if the employer determines not to hire based on the information.

Classes of potential employees have asserted claims against employers claiming that even a technical violation of the FCRA adversely impacts employment possibilities. Applicants are easily able to certify a class of plaintiffs in these cases, and courts have widely permitted discovery into a broad range of applicant and hiring practices. *See, e.g., Saltzberg v. Home Depot U.S.A., Inc.,* 2:17-CV-05798 (C.D. Cal., filed August 4, 2017).

iii. State Background Check Requirements

Although in most states following the FCRA notice requirements for rescinding a job offer will comply with the applicable state law, California has expanded its state regulations to require employers to provide more detailed information to applicants whose job offers are revoked based on the results of a background check. As noted above, under the federal FCRA, employers are required to provide notice to applicants both before (a pre-adverse action notice) and in connection with (an adverse action notice) the decision not to hire an applicant that the employer is considering withdrawing the employment offer based on information contained in

the background check report. Under the federal FCRA, employers do not need to provide any specific information to applicants. Effective January 1, 2018, employers hiring in California are subject to new requirements when rejecting applicants for employment or taking other adverse actions based on information contained in a background check report. California now requires employers to disclose precisely which conviction or other piece of information on which the employer has relied in making the decision not to hire the applicant. Employers must provide the applicant notice of his or her right to submit information challenging the accuracy of the background check report, evidence of rehabilitation efforts, or evidence of mitigating circumstances for the relevant convictions or pieces of information.

b. Asking For Salary History Information Or Using It To Set Starting Salary

Several states and certain cities now prohibit employers from requesting information regarding an applicant's salary history. For example, California prohibits employers from requesting (whether orally or in writing) the pay history of an applicant, either directly or through an agent of the employer, such as an outside recruiter. Cal. Lab. Code § 423.3. Effective October 31, 2017, employers in New York City may not request information regarding an applicant's salary history during the hiring process (including on applications and in interviews). New York City Administrative Code, 8-107(25). Other states have restricted when an employer can request salary history information in the hiring process. Delaware prohibits employers from screening applicants based on past compensation and from otherwise requesting information related to salary history until after an offer of employment has been extended. HB 1 (Act to Amend Title 19 of the Delaware Code).

Similarly, the Ninth Circuit Court of Appeals recently held that relying on pay history to set employee salaries does not constitute a defense to Equal Pay Act (EPA) claims of sex discrimination, overruling prior case precedents. *Rizo v. Yovino*, 130 F.E.P. 1437 (9th Cir. 2018); *see also EEOC v. Maryland Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018). Historically, pay history has been accepted by some courts as a "factor other than sex" that could justify pay differentials between men and women. This is clearly changing and employers should avoid asking or relying on pay history when setting salaries for newly hired employees. Particularly as efforts to require more detailed disclosure from private employers of pay information at the federal level, states and municipalities are likely to follow the trend of these salary history bans to move the needle on pay equity issues across the country.

3. EMPLOYMENT TESTS, SELECTION PROCEDURES, AND OTHER SCREENING METHODS

a. Failing To Thoroughly Vet Employment Tests and Selection Procedures

With the move from traditional hiring processes to online job applications, employers are increasingly seeking efficient ways to screen large numbers of online applicants in an objective way. Employment testing and other forms of data analytics have risen in popularity as mechanisms through which employers can find the best candidates for certain jobs. The EEOC and other enforcement agencies have asserted that the use of tests and other selection procedures can violate anti-discrimination laws if they disproportionately exclude applicants of a particular

protected class. Employers can justify the test or procedure in accordance with applicable law, but that does not insulate the employer from claims related to their use.

The EEOC has taken the position that if an employer uses a selection tool in the hiring process, the employer must validate the tool in accordance with the Uniform Guidelines on Employee Selection Procedures (UGESP), which among other things, demonstrates that the selection tool is assessing the job-related factors it purports to assess. 29 C.F.R. part 1607; 41 C.F.R. part 60-3. For example, an employer may believe a particular screening tool evaluates certain personality traits, when in reality, the tool screens out those with mental health disorders. The UGESP outlines several different ways employers can demonstrate that employment tests and selection procedures are job-related and consistent with business necessity. Generally, a selection tool is deemed to have an adverse impact if the selection rate for any particular group is less than 4/5ths (or 80%) of the selection rate for the highest group. Analyzing selection tools under these guidelines can be complicated and time consuming, but can also assist in defending the selection tools when challenged as discriminatory.

When considering whether to utilize personality or other selection test offered by vendors, it is important to inquire about what evidence it has of the effectiveness of the selection tool in predicting job-related skills or success. Even when a vendor has taken steps to validate selection procedures, a further inquiry should be made to document the applicability of the evidence of success to the employer's own workforce and job requirements. Finally, any use of selection procedures should be tracked over time by the employer to determine whether they continue to appropriately predict success in the job.

Like other risks discussed above, claims that selection procedures result in discriminatory impact can involve large damage claims. In 2015, Target Corporation paid $2.8 million to settle an EEOC claim, based on the EEOC's determination that certain of the employment assessments it used in hiring professional positions discriminated against applicants based on race, sex, and disability.

With increased use of online selection procedures and screening applicants using data analytics, this is an area ripe for litigation in the foreseeable future.

b. Relying Heavily On Data Analytics

Using algorithms to screen applicants can be an efficient way to find applicants who are most likely to be successful in the role. It is important for employers to carefully select algorithms or other analytics tools to ensure the tools are accurately able to predict success. The difficult comes in determining precisely what is successful.

There is risk in using data analytics in that the underlying data used to create the algorithms and other analysis may be imperfect. For example, by using criminal history as part of the algorithm, the algorithm may disproportionately exclude members of certain protected classes, including for example, applicants who are men and those of particular races. Additionally, modeling the algorithm for success based on those who have been successful in the past may promulgate patterns of discrimination. For example, if those who have been successful in the position in the past are white males, using an algorithm to predict who is likely to model

that success may result in using factors that will disproportionally include white males as opposed to women or members of other protected classes.[3]

In October 2016, the EEOC announced that it will more closely examine how employers use big data in the hiring process. "*Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC,*" EEOC Press Release (Oct. 13, 2016).

c. Screening Applicants Through Online Searches Without Appropriate Safeguards In Place

The ease and open access to information about job candidates makes searching for information about an applicant online an attractive option for many employers. However, legal traps abound when there are not appropriate safeguards in place. When searching online for information, employers can discover information regarding protected class information, including race, age, gender, familial status, marital status, and information regarding lawful activity outside of the workplace. In the event of a failure to hire claim, an employer will not be able to defend itself by arguing it was unaware of these protected characteristics if it has learned this information during an online search, even if it claims not to have based the decision on any of these factors. Although the case law in this area have been limited, employers face challenges in disposing of these cases at early stages of litigation because of the unfavorable facts it creates. For example, in 2010, an applicant for a director at the University of Kentucky brought a lawsuit alleging religious discrimination based on the University's online investigation of him. He alleged the University discovered information regarding his religious beliefs on a blog posting, and, in part, denied him the position based on those beliefs. *Gaskell v. University of Kentucky*, Civil Action No. 09-244-KSF, 2010 WL 4867630 (E.D. Kent. Nov. 23, 2010). Ultimately the case was settled, but the University was unsuccessful in defeating these discrimination claims at summary judgment.

To the extent employers continue to search for information online, they should put in place mechanisms to minimize the potential legal risks associated with these searches. Online searches should be conducted by a person who is isolated from the decision-making process such that the searcher can report only that information which is likely to result in disqualification for the position to the decision-makers, and not provide any protected information (for example, a recruiter, or a human resource professional). Employers who search for information online regarding applicants for employment should also do so consistently for all applicants for a particular position. For example, an employer should search for social media information at the same stage of the hiring process, and using the same general procedure for collecting information for all applicants at that stage. It is advisable to have a written policy or guideline for conducting these searches to ensure they are conducted consistently. Hiring managers should be instructed not to conduct online searches of candidates. Assuring managers that such information is being reviewed by others in the process, and educating them on the legal risks, may reduce their impulse to search candidates independently.

[3] For a detailed discussion of the use of algorithms, an enjoyable read is the *New York Time* Bestseller book, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, C. O'Neil (2016).

If an employer chooses to use a third-party provider to run an online or social media check to account for the issues noted above, the FCRA and similar state law requirements will apply, and the employer will need to follow the pre-adverse action and adverse action notice requirements described above.

4. MEDICAL EXAMS AND DRUG TESTING

a. Automatically Disqualifying Applicants Based On Positive Drug Test Result

Legislation related to medical and recreational marijuana has swept the U.S. In recent years, courts overwhelmingly sided with employers who took adverse action based on positive employment drug test results, even if those positive tests were verifiably the result of lawful marijuana use. These early decisions reasoned that marijuana remained illegal under federal law, and so employers were free to take adverse employment actions, even if marijuana use was legal under state law. *See Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015). That tide is changing - courts and state laws are evolving to provide additional protections for marijuana users, such that an employer cannot automatically disqualify an applicant based on the results of a drug test without further consideration. Many of the state medical marijuana laws enacted in the last few years include employment discrimination protections for those who are registered users under state law. For example, under Minnesota's medical marijuana statute, employers are prohibited from discriminating against an applicant in the hiring process based on a positive drug test for marijuana. Minn. Stat. § 152.32, Subd. 3. *See also*, Ariz. Rev. Stat. § 36-2813, Del. Code Ann. Tit. 16 § 4905A; 410 Ill. Comp. Stat. 130/40; Me. Rev. Stat. tit 22 § 2423-E. Case law has not developed in Minnesota as to how courts would handle a claim based on the employment discrimination protections of the state law. However, based on the precedent developing around the country, it is likely these discrimination protections will be upheld.

In 2017, the Rhode Island Superior Court held that an employer's decision not to hire an applicant who notified the employer that she could not pass the pre-employment drug screen because she was a medical marijuana user was a violation of the anti-discrimination protections of Rhode Island's medical marijuana law. *Callaghan v. Darlington Fabrics*, C.A. No. PC-2014-5680 (R.I. 2017). Rhode Island's medical marijuana statute, the Hawkins-Slater Act, provides that "No school, employer, or landlord may refuse to enroll, employ, or … otherwise penalize, a person solely for his or her status as a [medical marijuana] cardholder." R.I. Statutes Section 21-28.6-4(d). Even though the employer has a facially-neutral policy of requiring all applicants for employment to pass a drug screen, by denying her employment, the employer effectively denied her employment based on her status as a registered medical marijuana user, which was a violation of Rhode Island law. Similarly, the U.S. District Court for the District of Connecticut came to the same conclusion as it related to an applicant for employment who was a medical marijuana user. *Noffsinger v. SSC Niantic Operation Company, LLC*, No. 3-16-cv-01938 (D. Conn. Aug. 8, 2017). In connection with a pre-employment drug screen, an applicant informed her prospective employer that she suffered from post-traumatic stress disorder and took medical marijuana as a qualifying patient under applicable state law. In denying the employer's motion to dismiss, the Court held the applicant had the right to pursue a claim for discrimination under

the state statute, despite the provisions of federal law maintaining marijuana as an illegal substance.

APPENDIX

Hiring checklist

I. Define the Position.

- □ Create a job description for the position, including:
  - □ essential functions of the job;
  - □ required or desired educational background;
  - □ required or desired experience;
  - □ any unusual scheduling requirements; and
  - □ any physical demands that must be met.
- □ Determine whether the job will be exempt from the minimum wage and overtime requirements of the Fair Labor Standards Acts.
- □ Determine what type of restrictive covenant agreement is appropriate.
- □ Evaluate screening tools to be used to screen any applicants for the position.

II. Applications

- □ Review application to ensure it is compliant with state laws restricting the collection of certain information at the initial stages of hiring process (criminal history and salary information, for example).
- □ Consider requiring all applicants to complete an application, regardless of whether the employee provides a résumé.

III. Interviews

- □ Hold conversations with each interviewer to ensure the interviewers are clear about their role in the interview process.
- □ Ensure interviewers are aware of questions that cannot and should not be asked during the interview process.
- □ Consider asking same questions for all applicants for a position.
- □ Inform applicant that if he or she if offered a position, it is conditioned on a background check, medical exam and drug test, if applicable.

- □ Obtain written authorization from the applicant to obtain a background report.

IV. Conditional Offer of Employment

- □ Provide employee an Offer Letter, revising the following provisions as appropriate:
  - □ The initial hourly wage (if non-exempt) or salary rate (if exempt).
  - □ Conditions on the offer, such as a satisfactory background check, passing the drug and alcohol test, or passing medical exam.
  - □ Any requirement that the employee enter into a Confidentiality Agreement or a Confidentiality, Assignment Of Inventions and Non-Solicitation Agreement.
  - □ Any other conditions to the offer or the job.
- □ Enclose with the Offer Letter either the Confidentiality Agreement or Confidentiality, Assignment Of Inventions and Non-Solicitation Agreement, as appropriate.

V. Background check (if applicable)

- □ Provide the applicant's written authorization for a background check to the vendor.
- □ If there are concerns about the results of the background check, consider consulting with legal counsel.
- □ If decision is made not to hire the applicant because of background check:
  - □ First
    - □ notify the applicant that the Company is considering rescinding the job offer in whole or in part because of what was contained in the report;
    - □ provide the applicant a copy of the background check report and the legally required summary of legal rights; and
    - □ allow the applicant the opportunity to rebut the information contained in the report (typically, five days).
  - □ Second, after allowing the application the opportunity to rebut the information in the background report, send notice to the applicant that his or her job offer is rescinded.
  - □ If in California, provide the applicant information regarding the disqualifying conviction or other information, and provide the applicant the opportunity to present additional information related to disqualifying factor.

VI. Medical Exam and Drug Testing* (if applicable)

- □ Arrange for medical exam/drug test and provide details to offeree
- □ Review information from medical examination/drug test
- □ If there are concerns about the results, consider consulting with legal counsel.

* Medical exams/drug tests must be required only on a uniform basis for all individuals entering the same job category.

VII. First Day of Work

- □ Require new hire to sign any confidentiality, non-competition, or non-solicitation agreements
    - □ If hiring in California, verify any form agreement used does not include a choice of law provision that is governed by law outside of California.
- □ Complete I-9 paperwork for new hire
- □ Provide copy of employee handbook and complete handbook authorization