

Welcome Aboard!

Hiring Best Practices

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Getting it Right... From the Start

“If you think its expensive to hire a professional to do the job, wait until you hire an amateur.”

- Red Adair

“You’re only as good as the people you hire.” - Ray Kroc

“Time spent on hiring is time well spent.” – Robert Half

The true cost of a bad hire:

- Lost productivity
- Decreased morale
- Training
- Litigation, including possible class actions



Getting it Right... From the Start

- Employment law compliance in an increasingly regulated hiring context:
 - Compliance with Non-Discrimination Laws
 - Proper questions in context of applications, interviews
 - Background Screening – Striking the Right Balance
 - Avoiding Negligent Hiring lawsuits ...
 - ...while complying with new laws restricting background checks
 - Offer Letters
 - Proper Classification- wage and hour, independent contractors
 - At will employment vs. contract for definite term
 - Non-Competes

Non-Discrimination in Hiring Context

- Title VII and other non-discrimination laws prohibit discrimination against applicants and employees
- May not base hiring decisions on stereotypes and assumptions about a person's race, religion, sex, national origin, age, disability.
- Protected categories under federal law:
 - race, color, religion, sex (gender identity, sexual orientation, pregnancy), national origin, age (40 and older), disability, genetic information

Discriminatory Failure to Hire

- Prima Facie Case:
 - Member of a protected class;
 - Qualified for the position;
 - Despite qualifications, he was rejected for the position
 - Rejected for position under circumstances that give rise to an inference of unlawful discrimination.



“Qualified for the Position”

- “Sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made.”
 - Bennun v. Rutgers State Univ., 941 F.2d 154, 171 (3d Cir. 1991)
 - Once an applicant makes it to the final interview stage, he is considered “qualified” under the second prong. Nunn v. NHS Human Services, Inc., 110 F.Supp.3d 554 (2015)

“Circumstances that give rise to an inference of unlawful discrimination”

- Employer selected someone of lesser or equivalent qualifications who was not a member of plaintiff’s protected class.
- Was the plaintiff at least as qualified as the person selected for the position?
- Employer’s stated job qualifications and/or job description can effectively demonstrate lack of prima facie case.
 - Nunn v. NHS Human Services, Inc., 110 F. Supp.3d 554 (2015)

Importance of Job Descriptions and Position Qualifications

- “An employer is permitted to decide which job criteria are important and to determine what skill set is most appropriate for a given position.”
 - Nunn v. NHS Human Services, Inc.
- Be wary of relying solely on subjective criteria.
 - “The legitimacy of an articulated reason is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves ... are not members of the protected class.” Drew v. PHRC, 688 A.2d 274 (1997).



Job Postings

- Not legally required
 - Exceptions: VEVRAA, collective bargaining
 - Some employers have a voluntary policy requiring posting open positions
- Pros and Cons:
 - Pros:
 - Promoting from within is good for morale
 - Job advancement
 - Cons:
 - Looking outside the organization can bring fresh perspective
 - Broader talent pool

Job Postings

- Reliance on Word of Mouth recruiting
 - Not illegal, but could lead to disparate impact
 - Exclusive reliance on word of mouth recruitment may reinforce existing racial or ethnic makeup of workplace
 - Include additional recruitment techniques to avoid claims

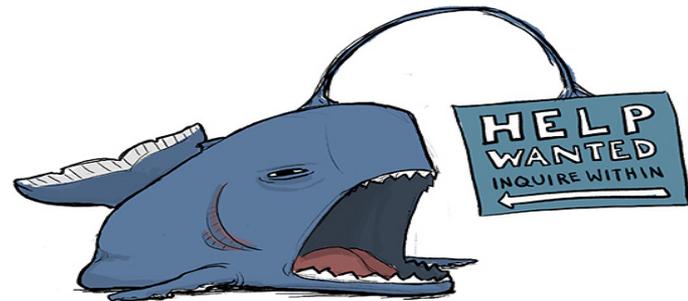


Job Advertisements

- Illegal to publish a job advertisement that shows a preference for or discourages someone because of race, color, religion, sex (pregnancy), national origin, age, disability, genetic information
- Equal Employment Opportunity Employer:
 - “The Company provides equal employment opportunity to all applicants and employees regardless of race, color, religion, sex, national origin, age, disability, genetic information, marital status or veteran status.”

Job Advertisements

- How to encourage diverse candidates to apply, while complying with Title VII?
 - Do NOT say, “Seeking retirees,” “seeking stay-at-home Moms,” etc. “Seeking” a particular kind of applicant is an unlawful preference
 - May, 2008 EEOC Informal Discussion Letter: “Seeking” – unlawful. “Encouraging” - acceptable
- Improper job requirements in job posting:
 - Age : “recent college graduates” discourages older workers
 - Gender
 - Disability



Job Advertisements

- “Must be currently employed.” - *Possibly Illegal!*
- Discrimination based on Unemployment?
 - No federal or PA law prohibits discrimination against the unemployed
 - Possible disparate impact claim
- Some states, including New Jersey, bar discrimination against those who are unemployed
 - In NJ, employers are prohibited from posting job advertisements that include a job requirement of current employment

Job Descriptions

- Accurate and Up to Date
- Set job expectations
 - Include minimum qualifications for position
- Management tool
 - Use for performance reviews
 - Performance Improvement Plans
 - Legitimate, non-discriminatory reason for discipline, termination

Job Descriptions

- **Americans With Disabilities Act considerations**
 - Essential functions of the job must be included
 - Fundamental job duties that employee must be able to perform, with or without a reasonable accommodation
- **FLSA Considerations**
 - If employee is classified as exempt, the job description must accurately describe the duties that support exempt status
- **Family and Medical Leave Act**
 - Essential Job Functions

Job Applications

- Improper questions- evidence of intent to discriminate
- No questions that inquire about any protected status
 - race, age, national origin, disability, religion, sexual orientation
- No questions that would reveal applicant's age
 - Remove questions that ask date of birth, the date that applicant graduated from high school, college.
- No questions that inquire about citizenship or country of birth
 - It is acceptable to ask if applicant is legally eligible to work in the United States



Job Applications

- No questions about maiden name or marital status
 - Some jurisdictions prohibit marital status discrimination
- No questions about dependents or children
- In Philadelphia, and many other jurisdictions, no questions about criminal convictions
- No questions about arrests
- No questions about credit history
- No questions about salary history
- Do not ask what type of discharge applicant received from military service
 - Its acceptable to ask for rank at time of discharge, type of training while in military service

Job Interviews

- No questions during the interview that would be improper on a job application
- Any question that would likely reveal the applicant's protected status is to be avoided
 - “Small talk” during an interview can be problematic.
 - For example, questions about church attendance, family life, children, can lead to a discussion of a topic that would be an unlawful consideration for hiring.
 - Do not ask if the applicant is pregnant or plans to have children.



Job Interviews

- Tips for avoiding claims:
 - Any manager who interviews applicants should be trained on avoiding discriminatory interview questions.
 - Prepare a list of questions in advance, including “small talk” topics, to avoid inadvertently asking a bad question.
 - Take notes during the interview to defend against false claims.
 - Do not make promises to the applicant.
 - Interview questions should be tailored to the job in question.
 - Ask the same questions of all applicants for the job.

Job Interviews – Do's and don'ts

- Don't ask: "Do you have children?"
 - BETTER: "This job requires overnight travel twice per week, will this be a problem?"
- Don't ask: "What is your native language?"
 - BETTER: If it is job-related, ask, "What languages do you read or speak?"
- Don't ask: "Are you a U.S. citizen?"
 - BETTER: "Are you eligible to work in the United States?"

Philadelphia's Salary History Inquiry Ban

- Philadelphia is the first city in the United States to ban salary history inquiries in the hiring process.
- Ordinance passed by City Council 1/23/17
- Unlawful to inquire about applicant's wage history
- Employment applications may NOT include wage history inquiries
- Unlawful to inquire about wage history during interview
- Exception: where law specifically authorizes wage history inquiries

Philadelphia's Salary History Inquiry Ban

- Lawsuit filed by Philadelphia Chamber of Commerce
 - Questions legality of law under US Constitution (First Amendment- free speech)
 - Motion for preliminary injunction currently pending
 - Enforcement stayed pending resolution
- Regulations adopted
 - “Applicant,” “Covered Employer” defined
 - Voluntary Salary disclosures clarified
 - Inquiries regarding applicant’s salary requirements/expectations permitted

Hiring and the Americans with Disabilities Act

- The ADA requires employers to make accommodations during the application and interview process.
 - Example: Job interview is on second floor of a building with no elevator. Applicant uses a wheelchair. The employer should conduct the interview on the first floor.
- Examples of prohibited questions under ADA:
 - Do you have a disability which would interfere with your ability to perform the job?
 - How many days were you sick last year?
 - Have you ever filed for workers compensation? Ever injured on the job?
 - What prescription drugs are you taking?



Americans with Disabilities Act- Medical Exams

- Pre-Offer: ADA prohibits all disability-related inquiries and medical exams, even if job-related.
- Post-Offer: After a conditional job offer is made, but before employee starts work, employer may make disability-related inquiries and conduct medical examinations, as long as it does so for all employees in same job category.



Pros and Cons of Background Screening

- Conducting careful background checks can have many benefits:
 - Avoiding a negligent hiring lawsuit
 - Avoiding problem employees
- However, almost all forms of background checks are regulated and can lead to lawsuits, including class actions, if done improperly:
 - Fair Credit Reporting Act
 - State laws limiting use of criminal background checks
 - “Ban the Box” laws

Arrests and Criminal Convictions

- “Ban the Box” laws- Philadelphia’s amended ordinance is highly restrictive!
- Some states – including PA – have laws limiting consideration of criminal background checks in hiring process.
- But, employers need to avoid negligent hiring and negligent retention lawsuits.
- Some employers are required by law to conduct criminal background checks and may not employ individuals with certain criminal convictions for certain positions.



Ban the Box Movement

“It is all one to me if a man comes from Sing Sing Prison or Harvard. We hire a man, not his history.”

- Malcolm S. Forbes

- Rationale for Ban-the-Box movement:
 - Ex-offenders who find steady employment have reduced recidivism
 - Fear of negligent hiring litigation resulted in widespread use of criminal background checks and blanket exclusion policies

Philadelphia's "Ban the Box" Ordinance

- The Fair Criminal Record Screening Standards Ordinance
- Enacted in 2011, recent amendments effective March 14, 2016
- ALL employers doing business in Philadelphia with one or more employees are subject to the ordinance
 - Limited exceptions for criminal justice agencies, domestic service workers.



Philadelphia's "Ban the Box" Ordinance

- Prohibits ANY questions about criminal records on job applications
- Employers may run a criminal background check only AFTER making a conditional offer of employment
- Prohibits employers from asking about mere arrests
- Prohibits asking about criminal records at any time before making a conditional offer of employment

Philadelphia's "Ban the Box" Ordinance

- What about employers that are mandated by law to consider certain criminal histories of applicants?
 - Wait until after the first interview to make the mandated criminal history inquiries, unless the law requires the inquiry to be made on the employment application or during the first interview

Philadelphia's "Ban the Box" Ordinance

- Consider only criminal convictions (NOT ARRESTS) that occurred less than 7 years from date of application.
- If a background check reveals a conviction, the employer must consider certain mandated factors, including:
 - Type of offense, time passed since offense occurred
 - Connection between conviction and job duties
 - Evidence of rehabilitation
 - Applicant's job history
 - Character or employment references

Philadelphia's "Ban the Box" Ordinance

- Ordinance forbids rejecting applicant based on a criminal conviction UNLESS the applicant poses an “unacceptable risk to the business, or other people” in the position applied for.
- If applicant is rejected, employer must send decision in writing, with a copy of the background report relied upon.
 - Applicant has 10 days to provide an explanation of the record, proof that it is wrong, or proof of rehabilitation.



Philadelphia's "Ban the Box" Ordinance

- Enforced by the Philadelphia Commission on Human Relations (PCHR)
- Penalties include injunctive relief, compensatory damages, attorney's fees
- If PCHR dismisses the case, or the case does not settle within 1 year, complainant may file in court

Criminal History Checks

- Absent special circumstances, there is no duty to conduct a criminal history search
- If employee will be having unsupervised contact with the public, should be considered
- There are special rules involving what can and cannot be considered in the hiring process

Negligent Hiring Allegations

Conducting a reasonable background check can provide a defense to a claim of negligent hiring – i.e. that the alleged assault, theft, etc by an employee would have been avoided if the employer had done a better job in the selection process.



Pennsylvania Criminal History Record Information Act

- Employers may consider only felony and misdemeanor convictions, not mere arrests
- Convictions may be considered only to the extent to which they relate to the “applicant’s suitability for employment in the position for which he applied”
- Employer must notify applicant in writing, if the decision not to hire is based on criminal history
- Attorneys fees and costs
- 18 Pa. C.S. § 9125

EEOC Guidance- Criminal Background Checks

- Having a criminal record is not listed as a protected class under Title VII
- However, the EEOC takes the position that an employer's use of criminal background checks may trigger liability under a disparate treatment or disparate impact theory
- Example of Disparate Treatment:
 - Inconsistencies in the hiring process
 - Similarly situated comparators

Disparate Impact and Criminal Records

- If a neutral policy disproportionately screens out a protected group, employer will be liable ...
- UNLESS employer demonstrates that the policy is “job related for the position in question and consistent with business necessity”

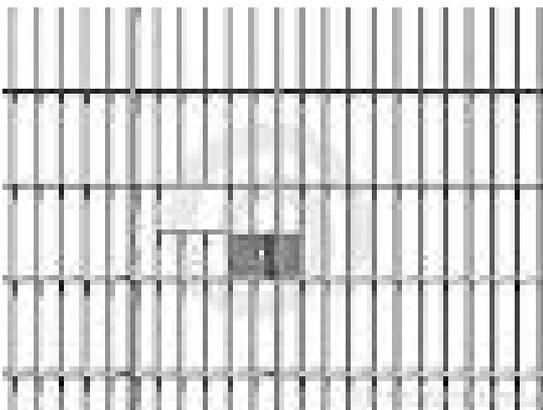
Employer's Burden

- Exclusion is “job related” for position in question AND consistent with business necessity
- The policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position



Criminal History Inquiries

- Do NOT ask about arrests or incidents that do not lead to a conviction (including diversion programs) or juvenile offenses
- Include a statement that a conviction will not be automatic grounds for rejection
- Be prepared to consider the particulars of the conviction – how long ago, what kind of offense, other incidents



Individualized Assessment

- In theory at least, employers need to be able to make each hiring decision based on a matrix of criteria that take into account the job at issue and the risks associated with the individual's background.
- Distinguish between crimes involving dishonesty, violence and those involving moral failures.
- Heightened scrutiny can be justified by vulnerable stakeholders

CREDIT CHECKS

Why do a credit check?

- Some believe that employees with good credit are more responsible or less likely to steal. There is little empirical evidence either way.



Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.)

FCRA only covers background checks conducted by an outside third party known as a Consumer Reporting Agency (CRA).

FCRA does not cover an employer who conducts an in-house background check such as navigating social media websites without the use of a CRA

Fair Credit Reporting Act

Under FCRA, an employer can obtain a background check from a CRA in the form of a consumer report – with the proper notice and authorization.

Employers must also provide prior notice to the applicant or employee before taking any adverse action against them based on the information obtained.

Background Checks on The Cheap



Yet More Perils of Social Media

Google



Caution #1 – Not All Information is Created Equal

Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the American Disabilities Act (ADA), all seek to eliminate discrimination in employment based on immutable characteristics. Other state and local laws prohibit discrimination based on workers comp history, political affiliation, familial status, etc.

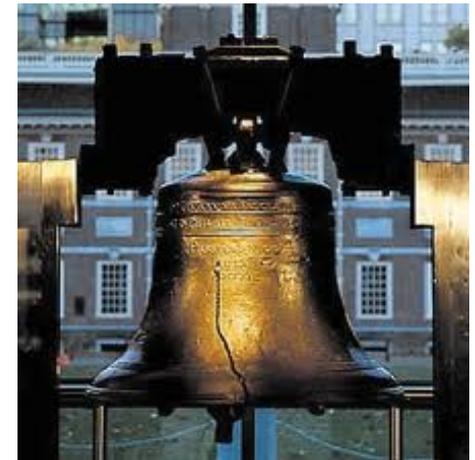
Protected Classes

- Age
- Race
- National Origin
- Disability
- Religion
- Sexual Orientation
- Marital Status
- Military Status

You Can't Un-Ring The Bell

A simple Internet search is likely to reveal all sorts of information about an applicant that you could not legitimately ask for on an application or in an interview.

Once you have that information, how do you prove you did not use it in the decision making process?



Social Media Privacy laws

- The Social Networking Online Protection Act would prohibit employers from requiring job applicants to provide social network passwords
- New Jersey social media privacy law prohibits employers from requesting current or prospective employees to disclose user name or password, or provide access to, personal accounts.



In Summary.....

- Figure out what you really need to know about an applicant and limit your inquiries accordingly
- Context matters
- More notice is better than less
- Get written consent – always
- Limit access to background information to “need to know”
- If you must resort to social media, build a firewall

Offer Letters

- Employment at will:

- Employer may terminate an at will employee at any time, for a good reason, bad reason, or no reason at all, so long as the reason for termination is not an illegal reason

- Include a statement in the offer letter, for example:

“The Company is an at-will employer. This means that you or the Company are free to end the employment relationship at any time, with or without cause or notice.”

Offer Letters

- **Employment at Will**
 - In Pennsylvania, an employee is presumed to be at-will, unless the employee provides clear proof of a specific duration to the contract.
 - If a contract exists for a specific duration, the employee may only be discharged before the end of the term if “just cause” exists.
- **The offer letter should make it clear that employment is “at will”**
 - Do not include any reference to an anticipated duration of employment.

Offer Letters

- The Pennsylvania Wage Payment and Collection Law requires the following information, in writing, at the time of hiring:
 - Time and place of payment,
 - Rate of pay,
 - Amount of any fringe benefits or wage supplements to be paid.

Offer Letters

- The offer letter should state whether the position is classified as exempt or non-exempt.
- Job titles do not determine exempt status; the actual job duties count.

Exempt vs. Non-Exempt- FLSA Exemptions

- Executive Exemption
- Administrative Exemption
- Professional Exemption
- Computer Employee Exemption
- Outside Sales Exemption
- Highly Compensated Employees
 - The position MUST meet all of the criteria for the exemption

Exempt vs. Non-Exempt

- Most common mistake: assuming that just paying a “salary” makes an employee exempt. This is not true!
- It is essential to properly classify each position under the FLSA and state law.
 - Be aware of differences between FLSA and local law.

Exempt vs. Non-Exempt

- The consequences of improper classification under FLSA:
 - Individual lawsuits
 - Department of Labor investigations
 - Class actions
 - Attorneys fees and costs
 - Liquidated damages
- It is costly and difficult to fix improper classification at a later date. Get it right, from the start.



Independent Contractors

- Proper classification of employees vs. independent contractors is essential.
- Federal and state governments are increasing audits and investigations.
- Individual and class action lawsuits are on the rise.
- The “gig economy” is based on independent contractor status, but class action lawsuits are putting this to the test (Uber, Lyft).

Independent Contractors

- Government agencies have different tests for independent contractor status:
 - IRS: Right to Control test (Behavioral, Financial, Type of Relationship)
 - US Dept. of Labor: Economic Realities Test (most workers are employees, per DOL)
- Other sources of varying tests for independent contractor status: workers compensation law, unemployment compensation, state law.

Offer Letters– Non- Competes

- Determine if you will be requiring a non-compete agreement in advance of hiring.
- In Pennsylvania, a restrictive covenant must be entered into at the inception of employment, in order to be supported by consideration.
- Under Pennsylvania law, continued employment is not sufficient consideration.

Offer Letters- Non-Competes

- In Pennsylvania, a covenant not to compete is enforced to the extent reasonably necessary to protect the legitimate business interests of the employer
- Restrictions must be reasonably limited in duration and geographic scope.

QUESTIONS ?

