HR Best Practices: Hiring Dos, Don’ts and Best Practices

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Posting, Screening and the Application Process

• From the outset, an employer must be mindful of the “big eight” of discrimination:
  – Race
  – Color
  – Religion
  – Sex (including pregnancy)
  – National origin
  – Age
  – Disability
  – Genetic information
Posting, Screening and the Application Process

- From the very beginning of the hiring process, employers must ensure the process is open to all applicants unless:
  - There is a BFOQ
  - A BFOQ is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...
  - There are literally thousands of cases where BFOQ has been litigated
  - If your company has established a BFOQ for the particular position, it must have the data and facts necessary to establish it is truly a BFOQ
The Posting Process

• It is illegal for a company to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information
• Job postings that include seemingly innocuous statements such as:
  – Seeking recent college graduate (age)
  – Seeking “young and dynamic” individuals (age)
  – Seeking a “mature” person (age)
  – Seeking young person to grow with company (age)
  – Those that use gender specific wording
  – Those that use job titles such as “handyman” or “sales girl” – (sex)
  – Asking for a photo with resume (you name it)
• The EEOC has noted that:
  - "Who ultimately receives employment opportunities is highly dependent on how and where the employer looks for candidates."
  - It has found issue with word of mouth recruiting
  - Homogeneous recruiting (advertising in a primary white demographic newspaper and excluding ethnic newspapers)
  - Limiting publication to a particular religious publication
    – (religion)
  - Limiting publication to one associated with a particular national origin (national origin)
The Application Process

• Use an application form not just resume – Why? Resumes can be misleading or simply false

• An application allows the company to gather information necessary to properly screen applicants

• It helps protect a company by ensuring uniformity of process – everyone is treated the same

• Provides a basis for terminating an employee who has falsified an application
The Application Process

• Carefully review the application to ensure there are no illegal questions such as:
  – Age and date of birth
  – Gender, race, religion and national origin
  – Avoid inquiry about health, medical problems, height and weight as some implicate the ADA and others sex or national origin discrimination
  – Avoid questions regarding education unless the position requires a particular level of education (and be ready to defend the determination)
  – Avoid questions regarding arrests unless you can demonstrate that the position is safety sensitive and the you are prepared to do an investigation to see if applicant likely committed the offense for which he/she was arrested
  – Avoid questions regarding convictions unless you can establish the question is related to the job requirements
  – Credit history or garnishment history
  – Citizenship questions
The Application Process

- The application should have a statement that the company is an equal opportunity employer
- Drug free workplace
The Screening Process

• You now have hundreds of applications on your desk, how can you screen the applications
  – Look for ones that have missing information – easy to eliminate – however if you follow up with one, be prepared to follow up with everyone
The Screening Process

• Use of social media in screening process
  – Many companies are starting to use social media as part of its initial screening process
  – Many routinely check Twitter, Facebook, MySpace, LinkedIn and other social media forums to screen candidates
  – However, the use of social media may create liability issues as often the social media contains information that the employer lawfully inquire about or ask for
  – To minimize the likelihood of a charge of discrimination, a person not involved in the hiring process should be assigned to review social media sites (pursuant to a standard written search policy), to filter out any information about membership in a protected class (that is, race, religion, and so on), and to only forward information that may be lawfully considered in the hiring process
• Use of social media in screening process (continued)
  – Employers should keep records of information reviewed and used in any employment decision, and be sure that only lawful information learned from social media sites is used in the screening process
  – You must check to see if there are state laws that prohibit the use of social media or restrict its use as it pertains to so called “off duty” conduct
  – Do not create a false identity to attempt to gain access to a person’s social media page
The Screening Process

• Beware of the Fair Credit Reporting Act in your screening process
• If you do not utilize a third party to perform your background checks, the FCRA does not apply
• If you do use a third party to perform your background checks, the FCRA does apply
The Screening Process

• Under the FCRA, a consumer report is:
  – Any written, oral or other communication of information by a credit reporting agency
  – Regarding an individual’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living
  – Which is used for consumer credit, or insurance, employment or other authorized purpose
The Screening Process

• Under the FCRA, the employer must obtain, in writing:
  – Permission from the applicant to complete the background check.
  – Should the employer decide not to hire an applicant based whole or in part of on the results of the background check, they must send the applicant a pre-adverse action action letter and allow that person a reasonable time to dispute the report.
  – If an applicant does not dispute the report or the employer, after reviewing the information provided by the applicant, still decides to not employee the applicant, the FCRA states that the employer must send the applicant the adverse action action letter.
  – No signature approving the background check, no third-party background checks.
The Interview Process

- The posting, application and screening process is child’s play compared to the land mines that await an employer in the interview process.
- Why? – once a person is selected for an interview, the stakes are raised. Many refuse to acknowledge that someone else was better qualified so there must be some other (illegal) reason why they did not get the job.
The Interview Process

- Careful planning for the interview will help prevent inquiry into illegal areas
- Questions should be related to the job description and requirements
- The interview questions should be written out (even if they are not read verbatim)
- Notes should be taken on each answer
- Follow up questions not on the script should be noted along with the answers
- All interviewee should be asked the same questions
- Questions should be a mix of the directed answer variety and broader questions that allows for latitude in answers
- “Small talk” often leads to dangerous areas
The Interview Process

- Try to avoid your “Zack” moment, that moment where you say to yourself “I don’t think this is a safe place for me to be.”
- Lawful and unlawful interview questions
The Interview Process

• Subject – name
  – Lawful: ever work under a different name
  – Unlawful: origin of current or former name
  – Unlawful: applicant’s maiden name
The Interview Process

• Age
  – Lawful: are you over 18
  – Unlawful: how old are you
  – Unlawful: what year did you graduate from high school
  – Unlawful: DOB
  – Unlawful: birth certificate
  – Unlawful: any questions which tend to identify age of applicant over 40
The Interview Process

• Residence
  – Lawful: current address or contact info
  – Unlawful: own or rent
  – Unlawful: birthplace of applicant or parents
  – Unlawful: previous address
The Interview Process

• Race
  – There are no lawful questions

• National origin
  – There are no lawful questions

• Religion
  – There are no lawful questions

• Marital status
  – There are no lawful questions
The Interview Process

• Citizenship
  – Lawful: whether applicant is a U.S. Citizen or has a current permit/visa to work in the U.S.
  – Unlawful: where were you born
  – Unlawful: questions regarding nationality, lineage, ancestry, national origin, descent or parentage of applicant
The Interview Process

• Disability status
  – Lawful: whether the applicant can perform the essential job functions with or without a reasonable accommodation
  – Lawful: can you lift 40 lbs. (Assuming it is a BFOQ)
  – Lawful: can you stand continuously 4 consecutive hours
  – Unlawful: do you have a disability
  – Unlawful: ever filed for worker’s compensation
  – Unlawful: how much sick leave did you use at your prior job
  – Unlawful: whether the applicant ever requested a reasonable accommodation at a prior job
The Interview Process

• Bottom line
  – Your interview questions should be limited to what is essential for determining a person’s job qualifications
  – You should not seek information not relevant for the job – race, sex, national origin, age, religion and other protected areas of inquiry
The Interview Process

• What happens if you have a “Zack” moment
  – An interviewee has voluntarily shared inappropriate information such as his national origin, a disability etc. Now what?
    ▪ You should not ask follow-up questions even though the human side of you says you should
    ▪ You should steer the conversation back to the structured interview
    ▪ If the interviewee persists in pursuing the discussion, tell the interviewee that it’s not appropriate in an interview to share this information and ask that he/she move on
    ▪ Keep careful notes to establish you did not bring up or pursue the illegal topic
Closing The Deal

- Document your hiring decision – the time you spend documenting the decision may be worth millions
- The documentation should include specific reasons why the person was selected
- Communicate with the others you interviewed that they were not selected for the job
Closing The Deal

• The job offer should:
  – Be in writing
  – Should be detailed as to the terms of the offer
  – Should have a sunset date for acceptance
  – Should require the applicant’s signature of acceptance of the terms of the offer
  – Should have a statement concerning the nature of the position – at will
  – Should attach any restrictive covenants including non-compete agreements, non-solicitation agreements, intellectual property agreements
  – Note any restrictive covenant agreement should be reviewed by your attorney as the scope and validity of these agreements vary by state
Closing The Deal

• Any post-offer, pre-employment physical examinations should be conducted
Credit Information

• For those you who require CLE/CPD or HRCI credits please note the following states have been approved, California, Ohio and Texas; as well as Arizona, New York, and New Jersey through state reciprocity laws. Florida is currently pending CLE. CPD and CPE have also been approved. If you require credit in a jurisdiction not pre-approved we can assist.

• Tomorrow you will receive an email with a link to an online affidavit. Open this link and complete the form. Don’t forget to include the affirmation code on the form. Once completed, PDF a copy of the signed form to Robin Hallagan at robin.hallagan@squiresanders.com

• Remember to complete the webinar survey immediately following the end of this presentation. You are required to complete this evaluation before receiving a certificate of attendance.
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