

A circular inset image showing a low-angle view of a modern glass skyscraper with a grid of windows and structural beams, set against a clear blue sky. The image is partially framed by a white circular shape on a blue background.

Avoiding Hiring Headaches: Legal Strategies for Making Effective Hiring Decisions

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Agenda

- Background Checks
- Salary History Bans
- Pre-Employment Testing
- Artificial Intelligence and Big Data
- Special Recruiting/Hiring Considerations for Government Contractors
- Non-Competes
- Other Dos and Don'ts of Hiring

BACKGROUND CHECKS

Criminal/Credit Screen Thought Question

What are some of the important characteristics of useful and defensible criminal/credit check screening processes?

Overview and Context

Nature of Policy	Potential Employer	Previous Employer
Insufficient	Negligent Hiring	Negligent Reference
Over Aggressive	Discrimination	Defamation

Background Check Procedures

- Legal considerations
 - Federal laws
 - Title VII
 - Fair Credit Reporting Act
 - State and local laws
 - Ban the Box laws

Background Check Procedures

- Criminal background checks
 - Arrests and Convictions
 - EEOC Enforcement Guidance
 - OFCCP Directive 306
- Two criteria to meet the ‘job-related and consistent with business necessity defense’:
- The employer validates the criminal conduct exclusion for the position in question using the *Uniform Guidelines*, or
 - The employer develops a targeted screen considering the *Green* factors (nature of the crime, the time elapsed, and the nature of the job) and then undertakes individualized assessment of excluded applicants

Background Check Procedures

- Credit background check
 - Permissibility and scope
 - State law requirements
- Risks of social media as background check tool
- Conditional offers and claims of detrimental reliance

EEOC/OFCCP Best Practice

- General
 - Eliminate policies that automatically exclude individuals with a criminal record
 - Do not mention criminal history in recruitment ads/materials
 - Indicate on the application that a conviction will not automatically bar an applicant from being hired
 - Consider criminal history after a conditional offer of hire
 - Train hiring managers about Title VII
- Develop a narrowly-tailored policy
 - Determine the specific offenses that may demonstrate unfitness for performing such jobs
 - Determine the duration of exclusions for criminal conduct
 - Conduct individualized assessments
 - Document the justification for the policy and procedures

SALARY HISTORY BANS

Salary History Ban Laws

- Currently, there are 15 state-wide bans, 12 local jurisdiction bans
- Most recent ban passed in Cincinnati, Ohio on March 12, 2019; effective March 2020
- The applicable restrictions and prohibitions vary. For example:
 - *California*: May not use salary history in setting new hire's pay even if employer already has the information or an applicant volunteers it. Must provide applicants pay scale information if they request it.
 - *Connecticut*: May not ask about salary history, unless volunteered
 - *Delaware*: May not use of salary history to screen, but can confirm after offer.
 - *Hawaii*: May not ask about salary history, unless volunteered. However, law does not apply to internal applicants.

Salary History Ban Laws

- Considerations for minimizing risks:
 - Written hiring guidelines
 - By jurisdiction?
- Training of HR, managers and other interviewers
- Establishing other defensible criteria for setting salary in accordance with federal, state and local law (e.g., Title, Equal Pay Act and state pay equity laws)

PRE-EMPLOYMENT TESTING

Legal Framework

- Uniform Guidelines on Employee Selection Procedures (UGESP)
 - Issued by EEOC, DOL, DOJ
 - Issued as “Guidelines,” but . . .
 - No substantial revisions in decades
 - Applies to “tests and other selection procedures which are used as a basis for any employment decision”
 - Employer must demonstrate that selection procedure is “job related and consistent with business necessity”
 - If adverse impact, must determine whether there is effective, less impactful alternative

Validation

- Obligation to validate selection procedure is triggered by adverse impact
 - 80% test and two standard deviation test
 - If no adverse impact, no obligation to validate
 - Cognitive and behavioral/personality tests vs. skills tests
- Validation studies
 - Off the shelf “validation” vs. true validation studies
 - Must establish that selection procedure is “job related and consistent with business necessity”
 - Criterion and content validation methodologies
 - Often conducted by IO psychologists; time and cost intensive

Other Issues to Consider

- If adverse impact must consider whether there is a less impactful alternative
 - Other tests or selection procedures
 - Lower cut scores
 - Blended selection procedures and weightings
- Re-validation when tests or jobs change
- Disability issues

Best Practices Regarding Pre-Employment Tests

- Pilot Programs
- Individualized Validation
- Ongoing Adverse Impact Analyses
- Vendor Due Diligence

ARTIFICIAL INTELLIGENCE AND BIG DATA

Big Data – Emerging Uses in Hiring

- Utilizing AI/big data to source candidates
 - Targeted job postings
 - Algorithms that data scrape and score resumes/applications
- Pre-Employment Tests/Games
 - Simple or complex “games” that collect personality or cognitive measurements; assessments that measure mental agility, attention, cognitive speed, spatial aptitude, numerical processing ability.
- Substituting AI for Recruiters
 - Behavioral assessment based on selection from pairs of statements
 - Video interviews where answers as well as facial expression, tone of voice, and language patterns are evaluated

Legal Issues – Big Data Uses in Employment

- Disparate Treatment
 - *CWA v. T-Mobile, Amazon Inc., et al.*
 - Is protected group status incorporated into the algorithm?
- Disparate Impact
 - Uniform Guidelines on Employee Selection Procedures (UGESP)
 - Adverse impact, job relatedness, less impactful alternative available
 - Algorithms are inductive – driven by data, not an understanding of the causal relationship between the variables and the outcome it seeks to predict
 - Challenges associated with machine learning and AI – is every iteration a new selection procedure that must be validated?
 - *Kleber v. CareFusion Corp.*, No. 17-1206 (7th Cir. 2018)
- Internet Applicant and Disability Issues

HIRING ISSUES FOR GOVERNMENT CONTRACTORS

Applicant/Selection Issues

- “Applicant” Definition is Key –
 - Expresses Interest, Considered, Minimally Qualified, Does not Withdraw
 - Dispositioning essential to determining applicant pool
- Size of “Applicant” Pool Matters
 - The larger the applicant pool, the more likely there will be adverse impact Incorrectly dispositioning candidates as “applicants” results in larger applicant pool
- The Risks of “Prospecting”
 - At what point in the recruitment process does an individual become an “applicant”
 - Searching internal databases
 - External prospecting
 - Sourcing jobs in a manner that does not inadvertently expand the applicant pool
- Veteran and Disabled Outreach
 - Document and assess each year

Citizenship Requirements

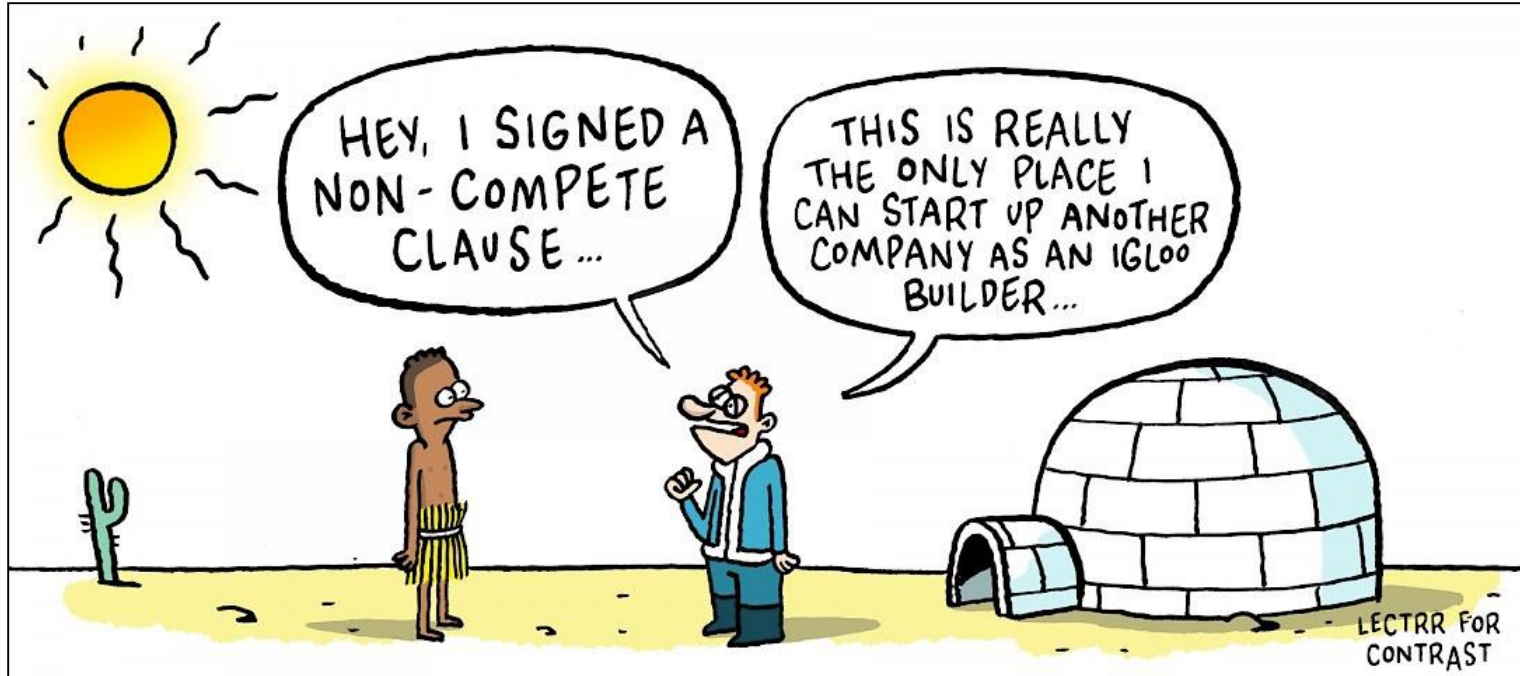
- Citizenship inquiries are generally prohibited by the Immigration and Nationality Act (INA)
- Inquiries regarding work authorization and employment eligibility are permitted
 - However, I-9 and E-Verify procedures must be strictly followed
- Exceptions to prohibition may be available where:
 - Citizenship requirement is imposed by law, regulation, executive order or government contract
 - Important to confirm that there is actually a “requirement”
 - Be mindful of undocumented requests or stated preference
 - Company is engaged activities regulated by the International Traffic in Arms Regulations (ITAR) or the Export Administration Regulations (EAR)

Citizenship Requirements

- Employees who are not U.S. citizens, U.S. nationals, lawful permanent residents, asylees, or refugees may not access ITAR covered technology without obtaining authorization from government.
 - But ITAR does not preclude hiring or recruiting of non-citizens
 - See February 25, 2013 Technical Assistance Letter, Department of Justice, Civil Rights Division, available at: <https://www.justice.gov/crt/file/837281/download> (ITAR does *not* limit the categories of work-authorized non-U.S. citizens an employer may hire).
- Limited inquiry regarding citizenship status for applicants whose jobs require them to access covered technology is *likely* permissible.

NON-COMPETE AGREEMENTS

Avoiding Non-Competition Risks



Avoiding Non-Competition Risks

- Identify and review any non-competition, non-solicitation or confidentiality agreements during the recruiting process – (i.e. before making an offer)
 - Know where to look (employment agreements, severance agreements, executive compensation agreements)
 - Include this item on hiring checklists
 - Determine enforceability of restrictions
 - Considerations: Applicable state law, scope of restriction, nature of employee's responsibilities, interest protected, and circumstances of employee's departure from prior company

Avoiding Non-Competition Risks

- Assess potential litigation risk
 - Types of claims: tortious interference, misappropriation of trade secrets/confidential information, aiding and abetting breach of fiduciary duty and defamation
 - Likelihood of lawsuit v. strength of defenses v. importance to business

Avoiding Non-Competition Risks

- Considerations for Minimizing Recruitment and Hiring Risks
 - Have employees confirm in writing that they have disclosed all restrictive covenants and that are not using or bringing any confidential information belonging to former employer
 - Avoiding inquiring about or accepting information about competitor's business or work processes, clients, financials or other confidential information

Avoiding Non-Competition Risks

- Carefully time discussions about having other employees from prior company join the new company – even in the absence of a non-solicitation agreement
- Consider requesting a carve out to authorize the new hire to engage in certain business activities for the new company.
- Respond to any demand or cease and desist letters
- Rescind offer or terminate employee if necessary

OTHER DOs and DON'Ts of HIRING

Hiring Best Practices

- Complete and accurate job descriptions
- Advertising job openings strategically and consistent with policy
- Interviewing effectively
 - Questions that track job requirements
 - Avoid questions regarding protected categories
 - Consistency across interviews
- Hiring decisions based upon job description and objective skills/experience
- Document reasons for hiring decisions
- Background Check and Drug Testing compliance
- Setting compensation appropriately – market and internal comparators



Questions?