

Smart Hiring In A Competitive (And Litigious) Job Market

Smart Hiring In A Competitive (And Litigious) Job Market

Presented by
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Employers & Lawyers Working Together

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Introduction


- Good onboarding = better retention
- Employment Litigation
 - 932 Total Charges Received by EEOC for Wisconsin in 2017
 - EEOC's Strategic Enforcement Plan focused on eliminating barriers in recruitment and hiring
 - Ounce of prevention (proactivity) . . .

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Replacing Employees and Defending Lawsuits is Expensive



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Three Phases of Hiring

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Phase 1 – Pre-Hire/Recruiting

- Start with an accurate job description for the open position



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Why Do You Need Job Descriptions?

- Provides clear recruiting guidelines and performance expectations
- Defines the job's scope and nature
- Exempt and non-exempt status
 - Defining duties helps prevent misclassification issues

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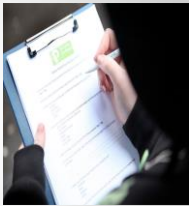
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Job Descriptions

- Defines essential job functions
 - Avoid potential disability discrimination issues
 - “Essential job functions” = those that are fundamental
 - Consider physical requirements
 - Attendance/scheduling requirements

Employment Applications

- Consider offering applications in other languages
- Accessibility issues
- Do not ask for SSNs on applications



Applications for Employment

- Arrest and Conviction Record
 - Ban the Box laws in various jurisdictions
 - City of Racine, Milwaukee, State of Wisconsin
 - Applies only to city/state employees
 - Wisconsin Fair Employment Act (WFEA)
 - Do not ask about past arrest records
 - “Substantially related” defense
 - EEOC guidance
 - Should not treat convictions as an absolute bar
 - Cannot take adverse action based solely on arrest

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Applications for Employment

- Social Media
 - Do not ask an applicant to:
 - Disclose a username or password for the purpose of accessing applicant's personal social media
 - Access personal social media in the presence of the employer



Phase 2 – Interviews

- Don't ask:
 - Date of birth or applicant's age (unless required by law)
- But you may state:
 - That applicant's hire is subject to verification that he/she meets legal age requirements for the job

Candidate Interview

- Don't ask:
 - Applicant's race/ethnicity/national origin
- But you may ask:
 - What language(s) applicant speaks, writes, reads, or understands (if language skills are relevant to job)



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Candidate Interview

- Don't ask:
 - Specific years of school attendance or graduation
- But you may ask:
 - Academic, vocational, or professional education and the public and private schools attended



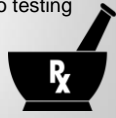
Testing Candidates

- Must be job related and accurate predictors of success on the job
- Employer pays all testing costs
- Reasonable accommodations for disabled applicants



Drug and Alcohol Tests

- Most employers can require applicant to pass pre-employment drug test
- Make offer contingent on results of drug test
- Notify candidate what will be tested
- Advise candidate to bring all prescriptions to testing facility



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Investigating Applicants: References

- Why do it?
- Get candidate's consent
- Only ask questions directly related to job and performance



Background Checks

- You can obtain information from public records
- Notify applicants that a background check will be completed
- Make offer contingent on results of check



Background Checks From Third Parties

- Obtaining a "consumer" report? Comply with the Fair Credit Reporting Act (FCRA)
 - Disclosure
 - Notice of Rights
 - Signed authorization from applicant
 - Provide copy to applicant
 - Decide whether report affects hiring decision

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Information on the Internet

- Use caution when conducting Internet searches on applicants
- You may look at an applicant's social media activity, but follow these steps:
 - Have a neutral, third-party employee look
 - Conduct limited search:
 - Inappropriate photos
 - Ties to a competitor
 - Opposition to your business

Eligibility to Work

- The Immigration Reform and Control Act of 1986 (IRCA)
 - Employers must verify that an individual is authorized to be employed in the United States.
 - Verify that every new hire is a U.S. citizen or authorized to work in the United States within 3 business days of employee's first day of work for pay

Eligibility to Work

- Cannot require different identity and work authorization documents than specified by the United States Citizenship and Immigration Services (USCIS).
- Honor documents that appear valid on their face
- Form I-9 exceptions

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Offering Employment

- Document factors that led to selection of successful candidates and
- Document specific factual, nondiscriminatory reasons for rejecting unsuccessful candidates
- Notify both successful and unsuccessful candidates



Phase 3 – Employment

- Ensure the terms of employment are clearly communicated and agreed upon
 - Start date
 - Schedule
 - Rate of pay
 - At-will employment
 - Benefits

Required Documents for New Employees

- Completed I-9 form
- Tax forms
- Wisconsin New Hire Program
 - www.wi-newhire.com
 - Required within 20 days

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Protecting Trade Secrets and Confidential Information

- Clearly identify your trade secrets and confidential data
 - Client/customer lists
 - Business information about clients/customers
 - Business or commercial plans
 - Marketing strategies
 - Pricing info
 - Competitor research



Explaining Trade Secrets

- Remind new hires to respect competitor's trade secrets and confidential information
- Consider a non-disclosure agreement
- Include Defend Trade Secrets Act employee notice to preserve damages



Onboarding

- Probationary period?
 - Benefits eligibility
- Handbooks/policies
- Training and orientation



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Questions?



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Thank You!

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