

# Hot Legal Topics for 2019: Seeing Opportunities through the Compliance Lens

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## Compliant Hiring in a Full-Employment Market



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## Issues in Current Market

- How to communicate job openings to the right market: talent + diversity
- Dealing with the glut of applicants
- Longer hiring process: Glass Door reports that interview process is now 22 days, doubling the time of 2010
- Bad hires have long lasting negative effects and are expensive



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## Artificial Intelligence (AI)

- AI can eliminate time spent reviewing applications
- AI can assess thousands of candidates instantaneously
- AI companies advertise that they can assess everything from innate empathy and politeness, to attention to detail, to “cultural fit”
- Uses Neuro Linguistic Programming (NLP) and advanced algorithms

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## Software that Allows for Greater Transparency in Process

- Johnson & Johnson uses a “Shine” platform
- Allows candidates to check on application progress, get information on next steps, and browse related information about the role and company relevant to where they are in the hiring process
- Could help minimize length of application process

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## Important Reminders

- EEOC and state agencies caution that selection measures may not disproportionately exclude applicants of protected classes
- Algorithms and other analytics tools must not disproportionately exclude protected classes
- In 2016, the EEOC announced it would be studying the use of “big data” and how it impacts protected classes
- “It is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity.” Jenny Yang, EEOC Chair

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## Important Reminders

- AI can adopt human prejudices. For example, if recruiters went by some AI algorithms, Steve Jobs would be weeded out because of his lack of degrees
- Many “success factors” that could be used in algorithms favor past success of white males
- Online searches should be conducted by a **trained** person isolated from decision-making process

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## What About Asking for Salary History?

- Several states and cities now prohibit/limit inquiries and consideration: California, Connecticut, Delaware, Hawaii, Maine (eff. date expected 9/17/19) Massachusetts, Oregon, Vermont, New York City, and other New York and Ohio counties
- Can be problematic under Equal Pay Act

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## What About Asking for Salary History?

- Laws vary in scope, but designed to assure hiring and compensation decisions are based on job-relevant criteria such as qualifications, job duties, responsibilities and market factors
- Precludes perpetuating past disparities based on past compensation history

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## Using Social Media in Recruiting and Hiring



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## Recruiting by Numbers

- According to CareerBuilder, 67% of employers screen potential hires using social media
- 49% of hiring managers who screen candidates via social networks said certain information caused them not to hire a candidate:
  - Provocative or inappropriate photographs, videos or information
  - Information about candidate drinking or using drugs
  - Bad-mouthing prior employer or discriminatory comments

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## Wisconsin Social Media Protection Act

Prohibits employers from:

- Requesting or requiring an employee or applicant to disclose passwords, user names, or other access information to a personal social media account
- Terminating or discriminating against an employee because the employee refused
- Refusing to hire an applicant because the applicant refused to provide access to a social media account

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### Caution with Social Media as Selection Tool

- Protected class information abounds on social media
- If online search and review of social media material shows you saw protected class status, employer cannot deny knowledge
- Consider a written policy for hiring staff, shielding decision-maker from that data
- Be consistent, objective and fair

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### Drugs



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### Initial Questions

- What do you do if you believe one of your employees is under the influence?
- Can you test that person?
- Can you fire that person?
- What if it's off the clock?
- Do you have to work through the issues with them?
- If you don't discipline that person, are you creating additional liability for yourself?



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## Medical Marijuana Legislation

- Marijuana is still illegal under federal law
- In early decisions, courts overwhelmingly sided with employers who took adverse action based on positive drug results
- Tide may be changing: courts and state laws are evolving to provide protections for marijuana users
- Ex: Minnesota now has a medical marijuana statute prohibiting employers from discriminating using positive THC result
- Trend is protecting medical marijuana users

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## OSHA's Position on THC Testing

- Prohibits employers from enforcing policies requiring mandatory drug testing after a workplace accident or other incident
  - an unlawful "adverse employment action"
- Employers are only permitted to perform incident related drug tests when:
  - there is reason to believe that an employee's potential drug use was likely a contributing factor to the incident, and
  - the drug test can accurately identify the impairment caused by drug use
- Unreasonable for employer to provide post incident drug testing for the following sort of problems: bee stings, repetitive strain injuries, lack of machine guarding, or machine malfunction

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## Legally Prescribed Drugs

- How does this change with use of legally prescribed drugs?
- Reporting of lawfully prescribed narcotic use to determine effect on duties
- Lawfully prescribed doesn't mean lawfully used
- If impaired, still subject to your drug testing policies

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## Drug Testing Policy

- Drug tests are not medical examinations under the ADA
- Pre-employment (but post-offer)
- Reasonable Suspicion
- Random
- Periodic
- Post-Incident



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## Drug Testing Procedure

- What are you testing for?
- Diluted samples
- Low temp samples
- Transportation to/from testing
- HIPAA waiver
- Ability to dispute/appeal



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## Training for a Respectful Workplace



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## A Respectful Workplace

- All employees are treated fairly
- Difference is acknowledged
- Difference is valued
- Communication is open and civil
- Conflict is addressed early
- A culture of empowerment and cooperation

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## Why is a Respectful Workplace Important?

- Supports good mental health
- Holds people responsible for their actions
- Fosters a workplace that embraces diversity
- Improves working relationships
- Improves problem-solving and conflict resolution
- Increases productivity and engagement
- Reduces workplace stress
- Supports a workplace culture of fairness and equity

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## How Do I Create a Respectful Workplace?

- Recognize and value diversity
- Value the contributions of all employees
- Positive communication and collaboration
- Equal and fair treatment to all
- Listening to others
- Willingly and sincerely apologize to co-workers you offend
- Communication, feedback, and workload planning

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### Examples of Disrespectful Behavior and Harassment

- Yelling, shouting, using profanity
- Spying/stalking
- Constantly interrupting
- Gossip/rumors
- Name calling/mockng
- Sarcasm or rolling eyes
- Offensive jokes
- Demeaning, belittling, or humiliating someone
- Ignoring someone
- Abuse of authority
- Undermining someone's career
- Unwelcome remarks, innuendos, or taunting
- Racial or ethnic slurs or nicknames
- Displaying or sending sexist, racist, or other offensive pictures or emails
- Actual or threatened physical assault
- Threatening or bullying

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### What is NOT Harassment?

- A difference of opinion
- Normal disagreements between co-workers
- A manager following up on absences or deadlines
- Legitimate feedback from a manager
- Appropriate discipline
- Enforcing policies or rules
- Being abrupt

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### Examples of Bullying

- Excluding or isolating someone socially
- Undermining or deliberately impeding a person's work
- Removing areas of responsibility without cause
- Assigning unreasonable duties or workload that are unfavorable to one person
- Establishing impossible deadlines
- Underwork or creating a feeling of uselessness
- Withholding necessary information or purposefully giving the wrong information
- Bullying via electronic means

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## Re-Boot Culture of Civility

- Culture makes all the difference
- Create a culture of respect where inappropriate behavior and harassment are not tolerated
  - “That’s just Joe, he doesn’t mean anything by it.”




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## Ideal Policies

- Equal Employment Opportunity
- Harassment/Reporting
- Employee Conduct and Work Rules
- Disability Accommodations
- Leave Policies
- Zero Tolerance Drug/Alcohol
- Computer/Email Use & Electronic Communications
- Social Functions




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## Empower All Employees to Report

- Ensure that all are comfortable reporting or at least know the reporting avenues
- If comfortable, address inappropriate conduct
- Create camaraderie to support your colleagues

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### Contributing to a Respectful Workplace

- Goal is that all communications are respectful, productive communications
- Feel empowered to constructively address inappropriate statements
- Be aware of a colleague’s discomfort
- Support colleagues, using a step-up/speak-up model
- Employ distraction/extraction strategies
- Know when/how to call additional support

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### Questions?



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