Welcome Aboard! How to Hire the Right Way

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The authors discuss significant legal issues relating to hiring, including the area of background screens; pre-employment testing; and non-discrimination and reasonable accommodations required in the hiring process. The authors conclude with a discussion of best practices to help employers navigate the hiring process with a minimum of legal risk.

As the economy continues to improve, businesses can anticipate that they will soon need to fill vacancies. This optimistic picture of job growth should remind prudent employers to review their hiring processes to ensure that when they do need to hire, they acquire the best candidate for the job with the minimum amount of legal risk. Indeed, there have been a number of recent legal developments impacting the hiring process. One of the most significant is the September 4, 2012 issuance of the Equal Employment Opportunity Commission's (EEOC) draft Strategic Enforcement Plan (SEP) which lists five "nationwide priorities" in its investigative and enforcement efforts. The top priority is "Eliminating Systemic Barriers in Recruitment and Hiring."

According to the SEP, during the next few years, the agency intends to focus its efforts on eradicating discrimination at the recruiting and hiring stages of the employment process. In stressing the need for priority in this area of the law, the EEOC explained that "racial and ethnic minorities, older workers, women, and people with disabilities continue to confront discriminatory policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools (*e.g.*, pre-employment tests, background screens, date of birth screens in online applications) that adversely impact groups protected under the law." The EEOC determined that it, rather than private litigants, was in the best position to eradicate discrimination in the hiring process. If the EEOC is interested in hiring bias, then employers are well advised to be interested as well.

Set forth in this article are significant legal issues relating to hiring, including the area of background screens, that is, criminal checks, credit

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checks, and Internet searches; pre-employment testing such as drug and alcohol, integrity/personality tests, skills testing, and the like; and non-discrimination and reasonable accommodations required in the hiring process. The article concludes with a discussion of best practices to help employers navigate the hiring process with a minimum of legal risk. The hiring process, if done right, will afford an employer a talented, qualified team of employees who are a good fit in the organization. So welcome aboard—enjoy successful and risk-free hiring.

BACKGROUND CHECKS

To verify credentials and uncover desired information regarding an applicant's work, criminal, and personal history, many employers conduct background checks as a regular step in their hiring process. In addition to ensuring job qualifications, conducting background checks can help employers protect themselves and the public from individuals who pose an unreasonable risk of harm and may also shield employers from potential negligent hiring lawsuits. While conducting background checks may be in the best interest of employers, in conducting such checks, employers must be cognizant of state and federal laws regulating the procurement and use of information regarding an applicant for the purpose of making hiring decisions. In recent years, stemming from concerns regarding employee privacy and the disparate impact that using criminal history and other information to disqualify applicants may have on minorities, laws governing background checks have evolved into a legal minefield, leaving employers puzzled regarding their rights and responsibilities. Employers now find themselves in a catch-22, fearing liability for failing to properly screen out applicants for employment, while, at the same time, endeavoring to avoid running afoul of the myriad anti-discrimination and other laws that govern the manner in which background information may be procured and to what extent it may be considered in making selection decisions.

Fair Credit Reporting Act

In addition to requesting background information in employment applications and checking references, an increasing number of employers choose to conduct more thorough investigations into their applicants' backgrounds. While some employers choose to conduct background checks in-house, many employers engage third parties, who have specialized experience, training, and expertise, to perform these background checks on their behalf. In using outside specialists, however, employers must comply with the Fair Credit Reporting Act (FCRA),[1] which prescribes detailed procedures employers must follow

in obtaining and using "consumer reports" for employment purposes.[2] Unwary employers run the risk of violating the FCRA. Although the title implies that its application is limited to traditional credit reports, the FCRA has been drafted and interpreted broadly.

The FCRA permits employers to obtain "consumer reports" for "employment purposes,"[3] but outlines certain steps employers must follow in doing so. The procedure employers must follow varies slightly depending on whether the employer is seeking a "consumer report" or an "investigative consumer report" from a "consumer reporting agency."[4]

A "consumer report" is any communication by a consumer reporting agency:

> bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part … for employment purposes.[5]

The term "consumer report" includes criminal background reports as well as reports containing information regarding an individual's motor vehicle records, educational and employment background, and licenses. An "investigative consumer report" is essentially a "consumer report" that was prepared by interviewing third parties.[6]

Provide Written Notice to the Applicant or Employee and Obtain Written Consent

Prior to obtaining either type of consumer report, employers must notify employees or applicants that they are obtaining or may obtain a consumer report for employment purposes in a clear and conspicuous writing.[7] The disclosure must be contained in a document that consists solely of the disclosure. It may not, for example, be a paragraph contained in an employer's application form. If an employer seeks an "investigative consumer report," the employer must make additional required disclosures, including explaining that the report will contain information as to the subject's "character, general reputation, personal characteristics and mode of living" and that the subject has the right to request a complete and accurate disclosure of the nature and scope of the investigation.[8] A disclosure of intent to procure an "investigative consumer report" must also contain a copy of the FCRA Summary of Rights form, which was previously published by the Federal Trade Commission (FTC). On or before January 1, 2013, employers should begin using the new FCRA Summary of Rights form, which reflects the transfer of much of the responsibility for interpreting the FCRA from the FTC to the newly created Consumer Financial Protection Bureau.

Employers must also obtain written consent from employees or applicants before attempting to obtain a consumer report. The authorization may be given on the separate disclosure form referenced above.[9] In obtaining

such authorization, many employers seek a blanket authorization from the individual that would allow them to obtain consumer reports with respect to present and future employment decisions. For example, an employer may obtain an individual's authorization to use a consumer report during the application process *and* at any future time for use in evaluating the employee for promotion, reassignment, or retention.

Provide Adverse Action Notices

The notice and consent requirement is not the end of an employer's obligations under the FCRA. Before an employer takes any adverse action (*i.e.*, denying employment or any other action that adversely affects a current or prospective employee) against an applicant or employee based in whole or in part on a consumer report, the employer must provide the individual with a pre-adverse action notice. The pre-adverse action notice must include a copy of (a) the consumer report and (b) the FCRA Summary of Rights form.[10] The purpose of the pre-adverse action notice is to give the consumer an opportunity to review the report and discuss or explain any discrepancies. As a practical matter, employers should wait a reasonable period of time (at least five business days) after informing an applicant or employee of its intent to take an adverse action before doing so. When making an adverse decision final, employers must provide an *additional* oral, written, or electronic notice to the employee or applicant. This notice must include a laundry list of specific information required by the statute, including the name, address, and toll-free telephone number of the vendor that conducted the background check.[11]

Consumer Report Disposal Rule

Employers that use consumer reports are required to take reasonable measures to dispose of sensitive information derived from consumer reports to protect against "unauthorized access to or use of the information."[12] This so-called Disposal Rule does not mandate any particular timeline for disposal; nor does it require a particular method of disposal. Instead, it affords businesses significant flexibility in devising their own disposal procedures based upon the nature and size of the business and the type of consumer information at issue. The applicable regulation contains a number of examples of what would constitute reasonable disposal measures, including burning and shredding.[13]

State Counterparts to the FCRA

Many states have their own notification and consent requirements applicable to employment-related background checks, and some

apply even where the employer chooses to conduct the background check in-house. So, it is critical to refer to the applicable state law and consult legal counsel before proceeding to obtain or use background information.

Arrest and Conviction Records

According to a recent study, 92 percent of employers subject some or all of their job candidates to criminal background checks.[14] In doing so, employers hope to combat employee theft and fraud, avoid workplace violence, improve the overall safety and productivity of their workplaces, and avoid liability for negligent hiring. In addition, employers in many industries, including those involved in childcare, health care, elder care, education and securities and banking, may be required by federal and/or state law to perform criminal background checks. Regardless of their rationale, in conducting criminal background checks, employers must be mindful of federal, state, and local restrictions on the procurement and use of arrest and conviction records.

EEOC Guidance

On April 25, 2012, by a 4-1 vote, the EEOC approved a new "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964" (the Criminal History Guidance). The new Criminal History Guidance replaces the agency's long-standing guidance on the subject originally issued in 1987. According to the EEOC, it was issued due to increasingly widespread use of criminal background checks by employers and criticism of certain aspects of the old guidelines in the Third Circuit case, *El v. SEPTA*.[15] Although the EEOC maintains that the new guidance does not reflect a change in policy, but merely updates and consolidates existing EEOC policies and guidance on the subject, the burdens it purports to impose will plague employers. While the EEOC will enforce the guidance as written, courts may consider but are not bound by the guidance, and whether they will agree with it remains to be seen.

Recognizing that Title VII does not expressly bar employers from considering arrest and conviction records in making employment decisions, the EEOC explains that employers may violate Title VII if they:

1. *Intentionally* discriminate against applicants with similar criminal histories by treating them differently on account of a protected characteristic; or

2. Maintain a criminal background check policy that has a *disparate impact* on a particular protected group.

It is this latter form of discrimination with which employers must be particularly concerned.

According to the EEOC, national data demonstrate that criminal record exclusions have a disparate impact on the basis of race and national origin. Accordingly, in investigating disparate impact charges, the Criminal History Guidance implies that the EEOC will assume that a company's criminal background check policy causes a disparate impact unless the company offers evidence to the contrary. Once a disparate impact is established, the employer must demonstrate that its use of criminal history information is "job related and consistent with business necessity."

To satisfy the job-related business necessity burden, an employer must show that any criminal conduct exclusion "operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." There are two circumstances in which the EEOC believes that employers may consistently meet the "business necessity" defense. First, the employer may validate its criminal history exclusion policy by using the Uniform Guidelines on Employee Selection Procedures, which identifies three different approaches to validating employment screens. However, the EEOC admits that this option may not be feasible due to the dearth of available studies regarding the link between convictions and future behavior/traits.

Second, the employer may develop a targeted screen, considering, at a minimum, the nature of the crime, the time elapsed, and the nature of the job (*i.e.*, the three factors identified in *Green v. Missouri Pacific Railroad*).[16] The employer would then conduct an *individualized assessmen*t for those people identified by the screen to determine if the targeted screen as applied is "job related and consistent with business necessity." This individualized assessment would include providing notice to the individual that he or she has been screened out because of a criminal conviction, affording the individual an opportunity to demonstrate that the exclusion should not apply to his or her circumstances, and considering whether the information provided by the individual warrants an exception to the targeted screen. Such information might include, for example, that the criminal record is inaccurate, or details concerning rehabilitative efforts, employment or character references, the applicant's age at the time of conviction, etc. Although the EEOC admits that Title VII does not necessarily require individualized assessment in all circumstances (*e.g.*, where there is a very tight nexus between the criminal conduct and the position in question), it nevertheless posits that a screening process that does not include individualized assessment is likely to violate Title VII.

Arrests and convictions continue to be treated differently for purposes of establishing the business necessity defense. The EEOC cautions that an exclusion based on an arrest is not job related and consistent with business necessity because an arrest, by itself, does not establish that criminal conduct occurred. However, an employer may make employment decisions based on the conduct underlying an arrest if the

employer has an independent basis for believing that the underlying conduct in fact occurred and the conduct makes the person unfit for the particular position in question. In contrast, a conviction record will usually serve as evidence that a person engaged in particular conduct. However, the employer must still demonstrate that the conviction exclusion policy effectively links the specific criminal conduct and its dangers with the risks inherent in the particular position.

The EEOC's guidance confirms that federal laws that restrict or prohibit employing individuals with criminal histories provide a defense to a Title VII action. However, state and local laws may be preempted to the extent that they purport to "require or permit the doing of any act which would be an unlawful employment practice under Title VII." Accordingly, the EEOC cautioned that if an employer's criminal history exclusion policy is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law will not shield an employer from Title VII liability.

The new Criminal History Guidance concludes with the EEOC's recommended "best practices" for employers, which strongly discourages blanket policies against hiring persons with criminal convictions and encourages the practice of individualized assessment. The EEOC also recommends that employers not ask about convictions on employment applications or early in the hiring process, even though Title VII does not prohibit doing so.

In light of the new guidelines, employers are advised to carefully review their policies and practices concerning criminal background checks and the use of criminal information in selection and other employment decisions. Also, employers should expect aggressive EEOC enforcement under the new guidance as well increased litigation by individuals rejected or excluded based on their criminal history.

State and Local Laws

State and local laws governing criminal history information take many forms. While some state laws impose restrictions on an employer's procurement of arrest and conviction information, others focus on an employer's ability to use that information in making employment decisions.

Apart from the state law equivalents to the FCRA, there are two main types of state and local restrictions on an employer's procurement of criminal history information. First, many states have passed legislation regulating the *content* of criminal history information inquiries. These laws prohibit employers from asking about certain types of offenses or dispositions. For example, in California, employers are prohibited from asking job applicants to disclose information regarding (i) any arrest that did not result in a conviction and (ii) certain marijuana-related convictions that are more than two years old.[17] In addition, California's

Fair Employment and Housing Commission, which enforces the state's anti-discrimination statutes, has promulgated regulations which prohibit an employer from asking about (i) convictions that have been sealed, expunged, or statutorily eradicated and (ii) any misdemeanor conviction for which probation has been successfully completed or that has otherwise been discharged.[18] Similarly, under Massachusetts law, employers may not make inquiries regarding: (i) any arrest or detention not resulting in a conviction; (ii) a first conviction for certain identified misdemeanors; or (iii) any misdemeanor conviction where the date of the conviction or the completion of any resulting period of incarceration, whichever is later, occurred five or more years ago unless the individual was convicted of any offense within the preceding five years.[19]

Second, many state and local governments have begun passing laws regulating the *timing* of criminal history inquiries in the hiring process. These so-called "ban-the-box" laws preclude employers from asking about criminal history during the application stage of the hiring process, requiring employers to remove the widespread check box from their employment applications asking prospective employees to indicate whether they have ever been convicted of a felony. "Ban-the-box" laws do not prevent employers from obtaining criminal history information from applicants. Instead, they require employers to wait until later in the selection process to make criminal history inquiries. The goal of these laws is to give individuals with criminal histories an opportunity to be judged on their own merit (at least through the completion of an interview) and to thereby improve their ability to reintegrate into the community.

In recent years, there has been a growing trend of "ban-the-box" legislation enacted in many states including Minnesota, Massachusetts, New Mexico, Connecticut, and Hawaii, as well as over two dozen municipalities, including Philadelphia, Chicago, Boston, San Francisco, Baltimore, and Seattle. Many of the jurisdictions that have implemented these measures have limited them to public employers or public employers and private employers doing business with public entities. However, both Hawaii and Massachusetts have extended their ban-the box prohibitions to private employers.[20]

Last year, Philadelphia became the first U.S. city to pass a "ban-the-box" law that applies to private employers. The Philadelphia Fair Criminal Record Screening Standards Ordinance took effect on July 17, 2011 and regulates when city agencies and private employers with ten or more employees in Philadelphia may inquire into an applicant's prior criminal history.[21] Specifically, under the new ordinance, Philadelphia employers may not:

1. Inquire about or take adverse action against any employee or applicant on the basis of any arrest or criminal accusation

which is not then pending against the person and did not result in a conviction; or

2. Make any inquiry regarding any criminal convictions during the application process until after the employer has conducted a first interview. Following an initial interview with the prospective employee (which includes any direct contact between the employer and the applicant), the employer may perform a background check and make inquiries regarding prior criminal convictions. Employers may also discuss criminal convictions disclosed by applicants during the initial interview where the disclosure was voluntary and unsolicited.

Ex-Offender Anti-Discrimination Legislation

What an employer does with criminal history information once it receives it may also be regulated by state or local law. Some states prohibit employers from discriminating against ex-offenders or otherwise considering certain criminal history information in making hiring decisions unless they can demonstrate that the ex-offender's conviction is job related or that employing the individual would pose an unreasonable risk of harm.

Pennsylvania employers are bound by the Pennsylvania Criminal History Record Information Act (CHRIA),[22] which precludes them from considering felony and misdemeanor convictions in the hiring process unless the conviction relates to the applicant's suitability for employment in the particular position in question. Arrest records may not be considered. The CHRIA also requires an employer to notify an applicant in writing if it decides not to hire the applicant based in whole or in part on the applicant's criminal history.

Similarly, in New York, employers may not deny an applicant employment based on a criminal conviction *unless*:

1. There is a direct relationship between the criminal offense and the job sought or held by the individual; or

2. Granting or continuing employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.[23]

The statute outlines eight factors to be considered in making the determination of whether to deny an individual employment based on a prior criminal conviction.

Moreover, absent certain limited exceptions, New York employers are prohibited from taking adverse action against an employee or applicant based on "any criminal accusation not then pending" that was terminated in favor of the individual.[24]

Credit Reports

Employers are increasingly using credit reports to help screen out applicants who they believe may be unreliable or untrustworthy. Prompted by the faltering economy, the practice of conducting credit checks on potential employees has recently come under fire by employee advocates who contend that the practice traps lower income people in debt because their past financial problems make it impossible for them to find suitable employment.

State and federal legislators have intensified their focus on employers' use of credit history as an employment screening tool. Eight states, including California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Washington, and, most recently, Vermont, have already passed laws imposing significant restrictions on employers' use of credit history information for employment purposes. These laws generally prohibit covered employers from inquiring about an applicant or employee's credit history or obtaining a credit report. There are, however, exceptions in these laws to allow the use of credit information in certain circumstances and for certain positions. Similar legislation is pending in more than a dozen states, including New Jersey, New York, and Pennsylvania.

At the federal level,[25] a proposed bill, referred to as the Equal Employment for All Act (H.R. 321) is currently pending before Congress. The bill, which was introduced by Representative Stephen Cohen (D-Tenn.) on January 19, 2011, would amend the FCRA to prohibit the use of consumer credit checks in making adverse employment decisions against employees or prospective employees, with only a few exceptions.

The EEOC has likewise stepped up its enforcement efforts in this area. For years, the EEOC, as well as many state fair employment practices agencies, has taken the position that the use of credit reports in employment decisions has a disparate impact on women and certain minority groups. Recently, however, the EEOC has become much more aggressive in trying to curb employers' use of credit checks.

Sending a firm message to employers, in December 2010, the EEOC brought a class action suit against Kaplan Higher Education Corp. in the Northern District of Ohio, charging that the company engaged in a pattern or practice of discrimination by refusing to hire applicants based on their credit histories. The EEOC contends that this practice has an unlawful disparate impact on African Americans and is neither job related nor justified by business necessity. This highly publicized lawsuit followed the EEOC's October 20, 2010 public meeting, where it heard testimony from various stakeholders on the growing use of credit history information in making employment decisions. Representatives of civil rights groups cited studies showing that racial minorities and women tend to have lower credit scores and argued that there is no evidence of any correlation between bad credit and job performance. It is unclear whether the EEOC will issue formal guidance following the

October 2010 meeting; but, the EEOC has nevertheless emphasized that employers should ensure that their credit history practices are entirely job related and consistent with business necessity.

Internet/Social Media Searching

The Internet and social media sites, in particular, contain a wealth of information regarding prospective employees. Not surprisingly, companies are increasingly using the Internet as a tool to screen applicants by reviewing their public Internet profiles and postings on Web sites such as Facebook, Twitter, and LinkedIn, or otherwise just "Googling" their names to see whatever pops up. While there are ample business reasons for using the Internet in pre-employment screening, accessing this information can open a can of worms. As the boundaries are just beginning to be tested, employers should tread carefully and consider adopting formal policies and procedures for conducting this type of background check.

Public Internet Searches

While there are no laws that currently prohibit an employer's access to information on job candidates available in the public domain, there are myriad federal and state laws that prohibit employers from making employment decisions based on certain protected characteristics or activities regardless of how such information was obtained. For example, under federal law, employers cannot base hiring decisions on protected characteristics, such as race, national origin, sex, age, religion, disability status, genetic information, pregnancy, and veteran status.[26] Some states extend this protection to other characteristics, including sexual orientation, familial or marital status, credit history, and criminal history. While most employers know not to ask applicants about these characteristics, a quick Google search or examination of a Facebook page can reveal all of that and more. A picture of an applicant alone may reveal protected information regarding his or her gender, age, and race.

In addition to an applicant's membership in a protected category, employers must also consider the risk of acquiring information regarding an applicant's protected activity, including the filing of discrimination or workers' compensations claims against former employers. Many states also have "off duty" laws, which prohibit employers from making employment decisions regarding an individual's lawful, non-work-related conduct. In New York, for example, an employer may not discriminate against or refuse to hire employees because of their participation in "legal recreational activities" off the employer's premises during nonworking hours unless the activity "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary

or business interest."[27] An applicant's use of lawful products, such as alcohol or tobacco, while not at work may also be protected by state law.[28]

Once saddled with information regarding an applicant's protected categories or activities, as a practical matter, it will be up to the employer to demonstrate that it did not influence the employer's decision not to hire the applicant. Accordingly, an employer that screens social media sites or "googles" its applicants may be handing rejected applicants a ready basis for alleging that the employer's adverse employment actions were taken due to a protected characteristic or activity. In the hiring context, there is such a thing as "too much information."

Prior to conducting background checks on the Internet, employers should evaluate whether the benefits outweigh the risks. Employers that decide to proceed with such screens should adopt policies and procedures outlining when Internet and social media searches will be conducted, who will conduct them, and what information will be evaluated. Recruiters, human resources personnel, and supervisors should be trained regarding the legal pitfalls inherent in Internet searching and the company's policies and practices.

To reduce the risk that decision-makers will acquire information that should not be considered in the hiring process, employers should consider designating certain non-decision-makers to undertake Internet background checks. Unauthorized employees would be prohibited from searching the Internet to find information regarding potential employees. The non-decision-makers would then pass along only relevant information to the hiring managers. Alternatively, employers can hire third-party vendors to conduct Internet searches on their behalf and screen out any protected information. In using such vendors, however, employers will be required to comply with the FCRA's notice and consent procedures as discussed above.

When using the Internet to screen applicants, consistency is important in managing legal risk. Employers become vulnerable to disparate treatment claims if they cherry pick which applicants to screen online or if they weigh the information found on certain applicants differently from other applicants. Careful documentation of the decision-making process is also important. Finally, employers may wish to require applicants to sign and date an authorization specifically allowing employers to check an applicant's social networking sites or online communications. Any authorization should include both an acknowledgement that the information may be considered in making an employment decision and a release of liability for accessing that information.

Requiring Social Media Passwords

The Associated Press recently reported that employers were increasingly requesting Facebook and other social media login information from job applicants to enable them to search through the applicants' social networking profiles that were restricted from the public or designated as private.

This news caused an immediate public uproar, prompting Facebook to respond with a stern warning to employers that demanding passwords of job applicants invaded privacy rights and could expose employers to liability. Facebook has since announced that it has changed its Statement of Rights and Responsibilities to make requests to share or solicit a Facebook username and password a violation of the social network's rules.

Lawmakers have likewise warned employers against requesting Facebook and other social media passwords while screening job applicants. In March 2012, two US Senators asked the Attorney General to investigate whether the practice violates federal law. Since then, several federal bills have been introduced to prohibit employers from requesting applicants' social media passwords or other access to online content, including the Password Protection Act of 2012 and the Social Networking Online Protection Act. At the state level, California, Illinois, and Maryland have already passed "password protection laws."[29] Similar measures are being considered in many other states including New Jersey, New York, and Pennsylvania.

In addition to this trend of password protection legislation, employers wishing to request applicants' login information to conduct searches of social media must keep in mind that such applicants may have a right to privacy sounding in constitutional, tort, or other statutory law. Accessing an applicant's private social media profile and communications may implicate the Computer Fraud and Abuse Act, which prohibits intentionally accessing a computer without authorization or exceeding authorization, or the Stored Communications Act (SCA), which prohibits intentionally accessing a facility through which an electronic service is provided without authorization. Although employers may argue that these acts do not apply to them because they obtain the applicants' authorization before conducting their searches, at least one court has found that an employer's request for a social media password does not render a search authorized within the meaning of the SCA if the purported authorization was coerced or provided under duress.[30]

While only employers in California, Illinois, and Maryland are currently *expressly* prohibited from requesting access to an applicant's social media login information, prudent employers will avoid this practice. Given the flood of recently proposed federal and state legislation as well as other existing avenues of relief, the public condemnation of the practice, and the potential for violating anti-discrimination laws by considering impermissible information found in social media sites in the hiring process, the benefits are clearly outweighed by the risks.

PRE-EMPLOYMENT TESTING

To help ensure the selection of candidates with the necessary knowledge, skills, abilities, and personal traits to successfully do the job, employers may chose to screen applicants using pre-employment tests.

Preemployment testing is not per se unlawful. However, in order to avoid liability under a range of federal and analogous state fair employment practices laws, employers should ensure that any test being administered reliably measures an attribute needed to do the essential functions of the job at issue and is an accurate, valid predictor of the attribute being measured and thus future job performance. Also, a test must be administered in a nondiscriminatory manner.

Types of Tests

Categories of employment tests most commonly used are:

- Cognitive ability tests, which measure general mental ability, verbal or math skills, spatial perception, or inductive/deductive reasoning;
- Skills tests, which are designed to test a particular skill (*e.g.*, typing) using a sample of a work product or work behavior closely approximating the work situation;
- Aptitude tests, which measure an applicant's ability to learn a new skill;
- Physical ability tests, which measure strength, endurance, and muscular movement;
- Personality tests, which measure attitudes, interests, personal relations, motivation, and the like;
- Honesty/integrity tests (considered a sub-group of and an early form of personality tests), which measure propensity toward undesirable behaviors, such as stealing, lying, etc.;
- Substance abuse tests, which test for drug and/or alcohol use and typically, are administered out of concern for ensuring workplace safety; and
- Medical examinations, which are administered by health care professionals and, like physical ability tests, often used to evaluate physical capacities (*e.g.*, range of motion, weight-bearing ability, etc.) in order to determine whether the candidate can perform essential job duties. Many involve biological and physiological assessments and may also measure psychological or mental capabilities.

Recent Enforcement Trends

Both the EEOC and US Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) have been active in this area.

As stated above, the EEOC's SEP set among its nationwide priorities eliminating systemic barriers in hiring, including screening tools such as pre-employment testing programs which may have an adverse impact on racial/ethnic minorities, women, older workers, and person with disabilities. During Fiscal Year 2012, the EEOC filed only half the number of lawsuits filed in the previous year, but has been devoting its resources to stronger cases, and thus is a more formidable opponent. Similarly, OFCCP continues to police federal contractors for alleged systemic discrimination in hiring. In audits of compliance with Executive Order 11246, the Rehabilitation Act, and Vietnam Era Veterans Readjustment Assistance Act, OFCCP routinely focuses on the impact of pre-employment tests on minority, female, and disabled applicants.

The practical impact of these agencies' vigorous enforcement activities and increased private litigation is that employers must ensure that their pre-employment testing practices strictly comply with applicable law.

Legal Considerations

Legal challenges to testing continue to be addressed under traditional models developed for disparate treatment and disparate impact cases. Testing cases under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act typically are analyzed under Title VII's adverse impact theory, and validation methods developed under Title VII apply across the board.

In general, a test that has an adverse affect on a protected class will be found to be discriminatory unless the test is job related and consistent with business necessity (*i.e.*, validated) for the job(s) at issue, or in the case of an age claim, is justified based on a reasonable factor other than age. Generalized validity of a test found by a test publisher will not suffice unless the employer can show the test is valid for use with its own workforce.[31]

Also, if a test has demonstrated adverse impact, federal agencies and many courts take the position that the employer is required to investigate whether there are alternative selection tools or uses of the test that serve business needs but have less or no adverse impact.[32]

Moreover, an employer can be subject to suit for years after a test was initially administered. The statute of limitations runs anew on each occasion an employer *uses* test results to make a selection decision, so repeated use of the same results can extend viable claims for years.[33]

Testing often can leave an employer caught between a rock and a hard place. If, for example, minorities suffer adverse impact because of the test, and the employer refuses to use the test results to avoid unintentional adverse impact, the employer may be found to have intentionally discriminated against the nonminorities who scored well and whose scores were rejected.[34] In *Ricci v. DeStefano*, certain white and Hispanic

fire fighters sought to force New Haven, Connecticut to certify test results the city had thrown out after determining the test had an adverse impact on other minorities, and the Supreme Court ultimately ordered their certification. Ironically, after the *Ricci* decision, the Second Circuit reinstated a black fire fighter's lawsuit alleging disparate impact based on the same test results certified in *Ricci*.[35]

Title VII

Title VII permits the use of "professionally developed" scored tests:

> Notwithstanding any other provision of this [title], it shall not be an unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[36]

While tests are not unlawful per se, tests that cause an adverse impact and have not been validated are discriminatory. The Uniform Guidelines on Employee Selection Procedures (Guidelines), promulgated in 1978, require ongoing preservation of records on adverse impact by race/sex/ethnic group of tests and other selection procedures, and where a procedure has adverse impact, set forth stringent technical standards for validation. The Guidelines use the four-fifths rule to define adverse impact: when a protected groups' selection rate is less than four fifths of the selection rate of the majority group, the EEOC and OFCCP will consider the procedure to have adverse impact, although statistical significance is ultimately the appropriate measure of whether adverse impact exists.

In addition to the Guidelines, the 1991 Civil Rights Act specifically provides that a test with adverse impact is justifiable only if the employer/respondent proves that the challenged test is job related and consistent with business necessity. This burden may be met by proving that a challenged test is "validated"; that is, that there is a greater probability that high scorers will perform better on the job than will low scorers. Although the details about how to conduct validation studies is beyond the scope of this article, employers should be aware that they must show that the attributes measured by the test are centrally and not merely peripherally related to successful job performance, that the various parts of the test are actually weighted to reflect the relative importance to the job of the tested attributes, and that the level of difficulty of the examination measures the level of difficulty of the job.

The Guidelines do permit interim use of a selection procedure with an adverse impact before it is validated where the user has available substantial evidence of validity and has in progress, where technically feasible, a study designed to produce the additional evidence needed

to complete validation within a reasonable time. However, if the study ultimately does not demonstrate validity, the section of the Guidelines permitting interim use does not constitute a defense in a legal action.

Aptitude/Skills Tests

Recent Title VII challenges to aptitude/ability tests make clear that they should be avoided unless, at a minimum, the test is specifically designed to measure only essential job-related abilities for the position in question, is required of all applicants in the same position, and has been professionally validated to accurately measure the aptitude or ability the test purports to measure.

In July 2012, OFCCP reached a settlement in a case against mozzarella producer Leprino Foods over its use of a test for on-call laborer positions. The "WorkKeys" examination measured applied math, workplace observation, and information location skills the employer claimed were relevant to those jobs. The OFCCP concluded, however, that neither the math nor observation skills were critical to successful performance. Over a nearly two-year period, only 49 percent of minority applicants passed, while over 70 percent of non-minorities passed, resulting in an adverse effect based on race. Leprino agreed to pay $550,000 in back wages, interest, and benefits to 253 minorities who failed the test.

In *Waters v. Cook's Pest Control*,[37] a class of nearly 500 African American job applicants sued the employer for racially discriminatory hiring practices, including use of a pen and pencil test which measured algebra, geometry, and other math skills. The plaintiffs alleged the test had adverse impact under the four-fifths rule, and had not been validated. They further claimed that the test was unnecessary because the skills it measured for calculating chemical mixing and application were taught to new employees via a training program, and were unnecessary in any case due to use of regulated flow-meters in modern post-control equipment. In July 2012, a federal judge approved a $2.5 million settlement of the case.

Drug Tests

Any type of test may implicate Title VII. In *Ronnie Jones, et al. v. City of Boston*,[38] African-American plaintiffs alleged that the City's hair drug-screening test had an adverse impact on blacks and was discriminatory. Here, the court found that the plaintiffs failed to make a prima facie case and granted summary judgment for the City. Over an eight-year period while the test was in use, whites passed it at rates of 99 percent to 100 percent, and blacks between 97 percent and 99 percent. Looking to the EEOC's use of the four-fifths rule to define disparate impact, the court concluded that plaintiffs had not shown it as both groups had high passage rates very close percentage-wise to each other.

ADEA

The federal ADEA protects individuals age 40 and over from disparate treatment and disparate impact based on age. It is unlawful for an employer to engage in facially neutral practices, including use of a test that harms older workers, although an employer can defend a disparate impact claim by demonstrating that its practice is based on a reasonable factor other than age (RFOA). Proof of "business necessity" is not required. Agencies and the courts will consider the following when determining if the RFOA defense applies:

- The extent to which the factor is related to the employee's stated business purpose;
- The extent to which the employer defined the factor accurately and applied it fairly and accurately (including the extent to which employer limited supervisors' discretion to assess employees subjectively particularly when the criteria or factors supervisors were asked to assess are known to be subject to age-based stereotypes);
- The extent to which the employer assessed the adverse impact of the practice on older workers; and
- The degree of harm to older workers *and* steps the employer took in reducing harm to lighten the burden on older workers.

Physical Ability Tests

Recent cases have challenged physical ability tests as discriminatory based on age. In *Hunter v. Santa Fe Protective Services, Inc.*,[39] age-protected plaintiff security guards sued Santa Fe over its use of a physical ability test (PAT). The guards had been among Clifton Dates Associates, Inc.'s employees who performed security services at the Army's Fort Rucker base before their employer lost the contract to provide those services to Santa Fe. In its contract with Santa Fe, the Army required that guards assigned to Fort Rucker pass a 2006 PAT based on standards for civil police set in an Army regulation. Those standards had changed over the years, but in 2006 required an applicant to do 29 sit-ups in two minutes, a 300 meter sprint in 81 seconds, 21 push-ups in two minutes, and a one and a half mile run in under 17 and a half minutes. In 2008, at Congressional request, the Army eased some of the 2006 standards.

A few plaintiffs were not medically cleared to even take the 2006 PAT, and none who took it passed, even after several tries. They argued that they were qualified to do the work at the base, as they had been performing it right along. The court agreed, shifting the burden to Santa Fe to defend use of the test. Santa Fe asserted that its contract

with the Army required passage of the 2006 PAT. The employees countered that the contract required passage of the PAT, but that Santa Fe was not required to administer the 2006 version, could have used the less demanding 2008 version, but did not do so because of discriminatory animus. The court concluded that Santa Fe's interpretation of the contract was reasonable, and that its decision not to hire plaintiffs was based on an RFOA. The RFOA standard which was applied is less stringent than the business necessity standard relevant under Title VII.

Where gender (Title VII), and not age, is the basis for challenging a PAT, employers face a tougher standard. A city in Texas was not as successful in defending its use of a PAT in connection with evaluating applicants for hire as entry-level police officers, and the case was recently settled by consent decree. In *U.S. v. City of Corpus Christi, Texas*,[40] the US Department of Justice (DOJ) alleged that Corpus Christi's use of the PAT violated Title VII because over a six-year period, it screened women out at a statistically significant lower rate than men, even after changes to cut-off scores had narrowed the gap, and that the PAT did not test for what actually was required by the job. The PAT required an applicant to do 25 pushups, 29 sit ups in a minute, run 300 meters in 65 seconds and one and a half miles in 14 minutes and 45 seconds. According to the DOJ, the PAT prevented the City from distinguishing between qualified and non-qualified applicants. The terms of the settlement included a $700,000 payment, and the City agreed to develop a new, lawful selection procedure and to make priority job offers with retroactive payment and length of service to qualified female applicants who previously had failed the PAT.

The ADA

The ADA prohibits pre-offer medical exams. Under the law, a duty to accommodate exists respecting the development, administration, and scoring of employment tests. While reasonable accommodation in testing does not include lowering an employer's legitimate qualification standards, an accommodation must be geared to the individual's needs.

The ADA defines discrimination to include:

- Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity; and
- Failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability

> that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).[41]

Medical Exams

The EEOC has filed several recent ADA lawsuits on behalf of applicants whose job offers were rescinded after the employer conducted post-offer medical exams. In late September 2012, the agency sued Aurora Health Care.[42] Aurora had extended offers to Kelly Beckwith and Charlene Helms, conditioned on their completion of a medical exam, and both were capable of doing the essential functions of the job offered. During their exams, Beckwith disclosed that she had multiple sclerosis and Helms that she had carpal tunnel disorder. Aurora also accessed their patient medical records. According to Aurora, the two withheld information, one about medication she may have been taking and the other about a surgery, which was contained in the patient records, and so Aurora rescinded the offers for their failing to disclose/dishonesty. The EEOC is seeking an injunction to bar the employer from reviewing job applicant patient records, and is also seeking damages for failure to hire in violation of the ADA.

In May 2012, the EEOC settled a lawsuit in which the agency challenged the employer's use of a medical test for tuberculosis.[43] Health care facilities are required to have detailed infection-control protocols to ensure prompt detection of infectious individuals, airborne precautions, and treatment of people with suspected or confirmed TB. Testing of health care workers is typically part of a plan. Thus, for years, most health care providers have regularly screened workers. In this case, a person with a positive test result allegedly was kept from working, even though she purportedly was not infectious. According to the EEOC, the ADA required that the employer conduct an individualized assessment of the worker's circumstances which in this case was not done.

Head Personality Tests

Personality tests are popular, but have also raised ADA issues. One company with almost 1,000 employees has been using a form of personality test know as an integrity test for six years without incident. The company reports that its workers' compensation claims have decreased dramatically because the test weeded out individuals likely to take dangerous risks or engage in undesirable behaviors. While these tests

are not medical exams, any personality test that has an adverse impact based on disability and cannot be shown to be job related and consistent with business necessity can be found to be discriminatory.

For example, the EEOC is currently investigating whether a personality test (which purports to measure whether applicants for customer service jobs would be friendly and communicate well) is discriminatory based on disability. The test was used by supermarket giant Kroger, Inc. to evaluate large numbers of job applicants. The EEOC's investigation arose from a disability discrimination charge filed by Vicky Sandy, a hearing and speech impaired woman who applied for a cashier job at a Kroger grocery store in West Virginia. She was rejected, at least in part, based on her performance on the Customer Service Assessment test, developed by Kronos Inc. and widely used by retailers. She scored 40 percent on the 50-question test which asked Sandy to rate the degree to which she was self-confident, cheerful, and tried to sense what others thought and felt. A post-test report based on Sandy's responses said Sandy was less likely than other applicants to listen carefully, understand, and remember, and it suggested that Kroger's job interviewer listen for clear enunciation and correct language when interviewing Sandy.

EEOC has successfully sought to enforce a broad administrative subpoena on test creator Kronos for information about the nationwide use of its assessment tests and their impact on disabled applicants. A few years ago, Kronos was ordered to produce validation studies and information manuals for the assessment test and information about its use nationwide by other employers. More recently an even broader production was ordered.[44]

The Third Circuit refused to limit Kronos's production of documents discussing adverse impact to those connected only with Kroger, and held that communications between Kroger and Kronos regarding the Customer Service Assessment *and* any other tests purchased by Kroger were relevant, even though they may not relate to any applicant's disability. Further, if those documents happened to reveal any other form of adverse impact (such as that based on race), the EEOC would not be required to ignore the information.

The effect this case will likely have on Kroger and other users of Kronos's tests nationwide is significant. Employers are cautioned that even tests created and validated by a professional test developer and widely used in one and more industries are not necessarily risk free.

Drug/Alcohol Tests

Testing for drugs and alcohol is governed by and subject to particular scrutiny under the ADA, but may also be challenged under other federal and state laws. In the private sector, employers have been allowed, subject to other applicable regulations, to require drug tests of their employees. But the courts have sustained challenges against employers from

plaintiffs who succeed in proving unreasonable conduct on the part of their employers. For example, the US Court of Appeals for the Third Circuit held that Pennsylvania law allows plaintiffs to sue employers for wrongful discharge if they are terminated for refusing to undergo testing that either fails to give due regard to the employee's need for privacy when performing bodily functions; shows a blatant disregard for the handling of samples; or is performed for improper purposes, *e.g.*, obtaining medical facts about employees that are not work-related.[45]

Other courts balance the employer's interest in safety against the employees' interest in some degree of privacy in their personal lives in determining whether a particular drug-testing program is allowed. Generally speaking, courts have been more inclined to tip the balance in the employer's favor when the testing is motivated primarily by safety concerns.

Unlike tests for illegal drugs, tests for prescription medications and for alcohol are medical examinations subject to ADA requirements. Post-offer pre-employment medical exams do not have to be job related. But, if an individual is screened out because of a disability, the employer must show that the exclusionary criteria is job-related and consistent with business necessity. ADA-covered employers that fail to exercise care in administering pre-hire medical exams do so at their own risk.

An employer may not conduct a test for prescription medications or alcohol until after it has made a job offer. If a post-offer test reveals prescription use, an employer may not take adverse action against the testee unless it determines that the drug was not taken lawfully or, if lawfully taken, unless the employer determines after an individualized assessment that the person cannot perform the essential functions of the job in question, with or without reasonable accommodation, and without posing a direct threat of harm to the health/safety of the person or others.

While post-offer alcohol tests are permissible, a testee's claim of a false positive result and request for an alternate test should not be dismissed out of hand. Such a scenario was at the root of a case which the EEOC parlayed into a pending nationwide class action against steel and coal manufacturer US Steel, which a district court recently refused to dismiss.[46] The testees were probationary employees, not applicants, but the case nonetheless is instructive. In this matter, Abigail DeSimone underwent a breath alcohol test. When she tested positive, she told the nurse that she had not ingested alcohol during the prior month and that the result was a false positive engendered by her diabetes. She asked for an alternate test. After the nurse refused, DeSimone promptly went to her own doctor, took a blood alcohol test which was negative, and her doctor faxed the results to US Steel. Nonetheless, US Steel terminated DeSimone. There was evidence that breath alcohol tests can result in false positives for diabetics, and here again, the employer failed to individually assess DeSimone's circumstances.

The EEOC recently settled for $750,000 in a case it brought against an auto parts manufacturer alleging that the employer's drug screen procedure violated the ADA.[47] The employer tested individuals for 12 substances, including prescribed drugs; those who tested positive for legally prescribed drugs were required to disclose the medical condition for which they were taking the medication, and those unable to perform job duties without the benefit of the medication were not permitted to be or remain employed. Apparently, no individualized assessment was done, and test results were announced in common areas and not kept confidential.

In 2011, a copper mill sued by the EEOC for rescinding an offer of a production job because of results of a post-offer physical exam agreed to pay $85,000 to settle the case.[48] The exam revealed that offeree Donald Teaford was receiving methadone in connection with his participation in a drug treatment program. The medical review officer (MRO) did not obtain information from Teaford about whether he suffered from cognitive problems due to methadone use, then tried without success to reach Teaford's doctor, and ultimately reported the positive test results to Hussey. The MRO recommended that Teaford not perform safety sensitive work, so the company concluded he would pose a risk to safety due to the methadone treatments, and it rescinded the job offer.

The EEOC argued that Teaford was qualified for the job, was not experiencing side effects from the medication, and the treatment program verified Teaford's successful and compliant participation in treatment. It faulted the MRO's handling of the matter and the employer's failure to make an individualized assessment.

GINA

Title II of the Genetic Information Nondiscrimination Act (GINA)[49] prohibits use of genetic information in employment decision-making; restricts employers from requesting, requiring or purchasing genetic information with certain specific exceptions; and requires that genetic information be maintained as a confidential medical record and limits its disclosure. Genetic information includes, among other things, information about a person's and that person's family members' genetic tests and family medical history. This prohibition on acquiring genetic information applies to medical exams related to employment. Where an employer requests medical information from an individual as required, authorized, or permitted by federal, state, or local law, and with it inadvertently receives genetic information, the prohibition in requesting/requiring/or purchasing genetic information does not apply if the employer's request contains proper disclaimers.[50]

According to the EEOC, an employer may never use genetic information to make an employment decision because it is not relevant to a

person's current ability to work. Information about family medical history should never be solicited from applicants or employees, nor should it be the basis for employment decisions.

In early 2012, a Peace Corps applicant whose offer to work in Namibia was rescinded based on the results of his post-job offer medical testing sued the government under GINA, the ADA, and Title VII.[51] The case is pending. After Omulepu's blood tests revealed a human enzyme deficiency (G6PD), he was denied medical clearance to work in Namibia because it is a malaria-endemic zone. While he did not challenge the permissibility of the test being conducted, he alleged that the agency violated GINA's prohibition on using genetic information when making hiring decisions. He also alleged that the agency's ban on allowing anyone with the deficiency to work in a malaria zone adversely impacted black men and thus violated Title VII, and that the Peace Corps' failure to consider an accommodation for the deficiency which may have enabled him to work in Namibia violated the ADA.

RELIGIOUS ACCOMODATIONS

Section 701(j) of Title VII requires an employer to reasonably accommodate the religious practices of prospective employees, unless doing so would result in undue hardship in the conduct of the employer's business. Failure to reasonably accommodate absent undue hardship constitutes unlawful discrimination. To prove religious discrimination, an applicant must show he or she has a bona fide, sincerely held religious belief (including a practice or observance) that actually conflicts with an employment requirement, he or she informed the employer about the belief, and the individual was subject to adverse employment action (such as rejection) because of the conflict. The employer then has the burden of proving it reasonably accommodated the person or was unable to do so without undue hardship. Based on a review of related case law, the following guidelines can be applied concerning what constitutes undue hardship:

- An employer cannot speculate as to the costs or hardship involved in an accommodation; concrete proof of same is necessary;
- An undue hardship arises when an accommodation would require an employer to incur more than *de minimis* cost. Routine administrative costs are *de minimis;*
- Unless an employer uses temporary or substitute workers for nonreligious reasons, costs of additional wages for use of such workers as an accommodation is greater than *de minimis.*

- A measurable loss of productivity from a worker's absence or from use of a substitute constitutes undue hardship; and
- Undue hardships results where:

  (a) An accommodation causes the employer to breach nondiscriminatory seniority provisions of a union contract or to violate the law;

  (b) An accommodation impairs or endangers workforce safety; or

  (c) An accommodation causes other employees to suffer a loss or diminution of their job rights.

An employer may not permit an applicant's need for a religious accommodation to affect in any way its decision to hire the person, unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship. While an employer need not offer religious accommodations that would result in undue hardship in the form of greater than *de minimis* costs or negative effects on other employees, an employer that fails to consider possible accommodations for a job applicant risks liability.

The EEOC's "Guidelines on Discrimination Because of Religion"[52] specifically addresses the scheduling of interviews, tests or other selection procedures, and the permissibility of pre-employment inquiries concerning an applicant's availability to work during an employer's scheduled hours. When a test or other selection procedure is scheduled at a time when a prospective employee cannot attend because of religious practices, the employer "test user" must make reasonable accommodation, absent undue hardship.

According to the EEOC, pre-employment inquiries about an applicant's availability to work during an employer's scheduled working hours violate Title VII unless the employer can show that the inquiry did not have an exclusionary effect on prospective employees needing an accommodation for the same religious practices; or was otherwise justified by business necessity. In a recent workshop, a senior EEOC attorney described cases involving dress and grooming policies as low hanging fruit for enforcement effort purposes, which is borne out by the number of such cases it has been filing. Most recent cases involving alleged religious discrimination in connection with hiring have focused on employee dress and grooming habits or work scheduling issues.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*,[53] the court granted summary judgment to EEOC on its claim that Abercrombie violated Title VII by refusing to hire a Muslim applicant, Samantha Elauf, for a store model job because she wore a headscarf, which was deemed inconsistent with the chain's "Look" policy. The court held that making an exception for Elauf to wear the scarf would not have caused an undue hardship.

The clothing retailer targets young adults and children. Its largest advertising is "in store experience" with models (*i.e.*, sales associates) who wear Abercrombie products. When she applied, Elauf wore the scarf, and based on her personal religious belief that Islam required doing so, had consistently worn a head scarf since age 13. Abercrombie was aware that her belief conflicted with its policy and refused to hire her despite the fact that she was well qualified for the job. Abercrombie argued that because the "Look" policy was essential to its marketing strategy, brand, ability to sell, and compliance, making an exception for Elauf would result in undue hardship. An expert testified to that effect, but the court noted that Abercrombie had not conducted studies or cited specific examples to support this assertion. More importantly, Abercrombie had granted religious exemptions to others in the past, allowing Jewish males to wear yarmulkes and females to wear long skirts inconsistent with skirts seen in the store.

In *EEOC v. Morningside House of Ellicott City, LLC*,[54] an assisted living center failed to hire a Muslim woman because she refused to work without a headscarf. The employer contended its rule prohibiting wearing the scarf was for safety purposes and an exception would cause undue hardship, but the woman argued that she had worn the scarf throughout nursing training, including in an operating room, without incident. The case settled for $25,000.

In *EEOC v. Fries Restaurant Mgmt., LLC*,[55] the agency recently sued the owner of a Burger King restaurant for refusing to accommodate a Pentecostal Christian woman who during the applicant process for a cashier job said that for religious reasons, she would need to wear a skirt instead of uniform pants. The employer initially agreed to the accommodation, but when the woman showed up for orientation in a skirt, she was told she could not wear it and would have to leave.

Historically, courts have been measured in their response to Title VII religious discrimination claims involving requests for more favorable shifts or work schedules. They have rejected accommodation requests that involve involuntary scheduling of other employees to accommodate weekend Sabbath observance.[56] However, allowing an individual to avoid required Saturday work by permitting her to swap shifts with others and use personal or vacation time may be required.[57] Also, offering a person an alternative job with a lower salary may be an appropriate accommodation where the schedule change a person requested would cause an undue hardship.[58]

In *EEOC v. Convergys Corp.*,[59] a woman who applied for a call center job, Shannon Fantroy, told the company's recruiter that she could not work on the Jewish Sabbath for religious reasons. The recruiter responded that Fantroy could not be considered for the job because she could not work Saturdays, and the interview was discontinued. The interviewer did not discuss any possible accommodations with Fantroy or even consider one. The case settled for $15,000 and the company

entered into a two-year consent decree obligating it to train all recruiters on religious discrimination and accommodation requirements and to give all job applicants a notice stating that religious accommodations might be available.

Of course, an employer that properly considers accommodations may not need to make one. Recently, in *Fouche v. New Jersey Transit Corp.*,[60] the court upheld a district court's award of summary judgment to the employer on a failure to accommodate claim. In that case, Fouche, a Christian, contended that he could not work on Sunday, his Sabbath, as required of bus drivers. Because accommodating him would have required shifting some of the Sunday driving to other employees, and would have resulted in breach of a seniority provision of a union contract, the accommodation would have caused undue hardship.

BEST PRACTICES IN HIRING

One of the best ways for employers to protect themselves from running afoul of the dozens of rules and regulations governing best practices in hiring is to have a step-by-step process in place to ensure a quality hire at minimal risk. The hiring process generally follows five steps:

1. Identifying an open position and the qualifications associated with the opening;
2. Advertising and recruiting;
3. Interviewing candidates;
4. Screening potential candidates; and
5. Selecting a candidate and making an offer.

Identify an Open Position and the Qualifications—The Importance of the Job Description

The first step in the hiring process is to identify the position to be filed and to ensure that an adequate job description exists for that position. The job description is critical for both practical and legal reasons. The job description gives the hiring managers a tool to help ensure that individuals with the right background and skill set are matched to the appropriate role within the organization. They provide compensation professionals the framework for benchmarking the organization's jobs against the external market, and they create a baseline set of expectations that can guide performance reviews.

Moreover, state and federal laws prohibit employment discrimination and require that an employer reasonably accommodate the disabilities

of employees and applicants. Well-constructed job descriptions play a critical role in an organization's legal defense because they can help an organization prove that hiring, promotion, and termination decisions were based on articulated job requirements and not personal characteristics. Additionally, the ADA prohibits discrimination against qualified applicants with disabilities. The determination of whether an individual is qualified depends on the applicant's ability to perform essential job functions with or without reasonable accommodations. The courts frequently turn to an existing job description to assess whether an employer considers the identified functions as essential.[61]

The job description should follow the following format:

1. *Title*. The job description should have a job title reflecting the type and level of work. Consideration should be given to the human resource information system, including how many titles the system can handle, and how the job will be viewed both within and outside the organization;

2. *Exempt/Non-Exempt Status*. This section indicates whether the job is exempt or not exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act and comparable state law. Whether the duties of a particular job qualify as exempt depends on what they are. Job titles and position descriptions are useful only if the title/description accurately captures actual job duties. More information about exemptions can be found at: *www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf*;

3. *Reporting Structure*. This section should state the title of the position to which the job reports. It should also include any dotted-line reporting relationships and the title of any direct reports;

4. *Summary*. This section should provide an overview of the job's purpose and responsibility. It should be concise and clear and be a summary only;

5. *Duties and Responsibilities*. This section should include the duties and responsibilities of the position and should identify those functions considered by the employer to be the "essential" functions of the position. As with the summary, clarity and conciseness is critical;

6. *Requirements*. This section should describe the minimum requirements necessary to perform the job. The list should be actual requirements rather than preferences, and should be applied to any and every candidate being considered for a position;

7. *Working Conditions*. This section should only be included if there is something unique about the working conditions or

environment (such as unsafe area). This is not usually included for office jobs; and

8. *Disclaimer*. A disclaimer should indicate that job descriptions do not typically include every duty or responsibility of the position and that the individual may be required to perform other duties as requested.

Job descriptions are critical to the hiring process and must accurately capture a job's duties and responsibilities. An employer should ensure that descriptions are up to date and should schedule rewrites on a routine basis so that currency of the documents can be maintained.

Advertising and Recruiting

Vacancies should be posted internally so that existing employees have the opportunity to apply for these positions. Posting internally may not be adequate, however, to ensure a pool of diverse and qualified candidates. Advertising should be placed in areas with some ethnic diversity and an employer should consider the timing of those ads. At least one court has held that deferring targeted marketing until after determining that there was insufficient diversity in the applicant pool could carry an inference of discrimination.[62]

The contents of the ads should also be considered. For example, the language in all advertisements must be strictly related to the job. A brief description of the essential job functions, duties, and required qualifications is permissible and encouraged. Further, a reference that the company is an "equal opportunity Employer" or "EEO" should be contained within the advertisement. However, in order to maintain compliance with Title VII, the ADA, and the ADEA, an advertisement must not express a preference with regard to race, color, religion, sex, national origin, age, disability, or other protected characteristic, unless those specifications are based on good-faith occupational qualifications.

Interviewing

Interviewing is a critical part of the hiring process and it is crucial to understand what questions are and are not permissible. It is permissible to ask questions that relate directly to the candidate's ability to perform the essential functions of the job as stated in the job description. What cannot be asked are questions that relate to the applicant's membership in a protected class, such as:

- How old are you?
- What is your religion?

- Where were you born?
- What does your wife do for a living?
- How long do you plan to work before you retire?

Nor may an interviewer ask questions that correlate with one of the protected classifications or could have the effect of excluding applicants based on protected classifications.

It is also important to avoid statements that could be alleged to create a contract of employment. Words such as "permanent" and "long-term" and "for life" should be avoided.

It is helpful for the organization to provide sample questions to interviewers. This not only avoids unlawful questions, but ensures that the interviewer asks each candidate the same questions and affords a means of comparison of candidates.[63]

In addition, interviews are often conducted by peers and can include more relaxed settings such as lunch or dinner. It is important to impress upon those conducting interviews in these relaxed settings that the questions are still part of the interview process and the same rules, regarding appropriate/lawful questions and statements apply. Training should be conducted of anyone handling interviews to ensure an understanding of the process.

Screening Potential Candidates

The Employment Application

As an initial matter, every candidate should complete an employment application. This document allows an employer to collect information necessary to assist with the hiring process and to check basic qualifications.[64]

There are restrictions on the types of information that can be solicited on an application form. Like with interviews, an application cannot request any information regarding sex, age, race, national origin, religion, disability, or other protected characteristic. Nor may an employer ask for information correlated with one of these protected characteristics. The rules governing employment applications have changed over the years, and when using a form, employers should ensure that the application form is current and complies with all existing federal, state, and local restrictions as to what information can and cannot be solicited.

Employment applications should ask for past work experience and educational background and before an offer is extended, this information should be verified. It may come as no surprise that a large number of individuals are blatantly dishonest and conducting this preliminary screen will greatly enhance the chances of catching the individuals who do not tell the truth and do not meet basic qualifications. While

checking past employment, efforts should be made to obtain substantive information. It is true that many companies limit references to dates of employment and positions held, but this should not act as a disincentive. Speaking to former managers will often provide a greater level of detail about past performance and is worth a try.

The application should also include a question asking whether the candidate is subject to any post-termination agreements with a prior employer like a non-compete, non-solicitation, or confidentiality agreement. It is best to know about these potential restrictions on a candidate's hire before receiving a "cease and desist" letter from the prior employer.

The application should state that the company is an EEO employer and does not discriminate in any aspect of the employment relationship. Additionally, if the employment relationship is an "at-will" relationship, it should be clearly stated that either party may terminate the relationship for any or no reason.

Background Screens

An employer may want to conduct criminal or credit checks on employees depending on the position. As explained above, if a third party is conducting the check, the Fair Credit Reporting Act requires that the applicant receive detailed information about his or her rights under the law, give consent to the background screen, and receive various notices of any potential adverse action. The rules regarding criminal checks have changed significantly of late, and should be reviewed to ensure compliance with all federal, state, and local restrictions on accessing and using this information. Be particularly careful of any per se bar to employment based on convictions since the EEOC requires that the employer conduct an individualized inquiry into the nature of the offense, when it occurred, and whether it has any relation to the position sought.[65]

Making the Offer

Once the company decides on the candidate who is most qualified for the job, an offer should be made. Many companies will condition the offer on passing tests such as integrity, personality, medical/drug, or skills tests. An employer should consider the cost and utility of the test as a true predictor of future performance as well as the legal restrictions governing this area.

Any employment offer should be communicated in writing. The letter may state the employee's position, responsibilities, and reporting relationship, but if it does, the letter should also include a disclaimer that these aspects of the employment relationship are subject to change at

the employer's sole discretion. Similarly, with regard to pay, the letter should include the starting salary or wage rate only and indicate that the employee may be eligible for increases at the employer's sole discretion. Benefits should be addressed in terms of coverage and the letter should clearly state that eligibility for benefits and the amount of benefits is controlled by the plan documents themselves. Finally, the letter must include clear "at-will" language.

Some states require that new hires receive salary/wage information in writing. For example, New York State requires that employers provide newly hired employees with written notice advising them of: the rate of pay and the regular pay day designated by the employer; and for all employees eligible for overtime compensation, the employee's regular hourly rate and overtime rate of pay. Employers can provide the required information to new hires by adding it to their offer letters. Employers also must obtain a written acknowledgement from employees confirming receipt of the written notice. Employers should retain the signed offer letters as proof of compliance.[66] All written notices must be preserved and maintained for six years.

It is also critical that the employer decide if it wants to require new hires to execute a restrictive covenant such as a non-compete or non-solicitation agreement. These agreements are enforceable only if supported by sufficient consideration, such as an initial offer of employment. While the rules and regulations governing the enforceability of non-competes are beyond the scope of this article, it is important that a company consider whether to require a restrictive covenant *before* employment begins. If a company wants to impose these restrictions, the employee should be informed of the need for a non-compete during the hiring process and given a copy of the document before an offer is made and certainly no later than along with the offer letter. All offer letters should be maintained in the employee's personnel file.

Record Retention—Hiring Records

There are several federal laws that apply to the retention of applications and resumes. It is good practice for an employer to retain documents based on the lengthiest period of time required by any of the applicable laws. Major federal antidiscrimination laws addressing the retention of employment records and, specifically hiring records, include Title VII, the ADA, and the ADEA. Employers covered by these laws must keep hiring records for each position for at least one year from the date of the hiring decision (*i.e.*, the date the position was filled). Hiring records include, but are not limited to, all applications and resumes considered for the position, selection testing (employment tests, drug tests), and investigations (reference checks, background or credit checks). In addition, if there is a discrimination charge pending, all relevant hiring records must be retained until the conclusion of the case.

Federal contractors may be subject to longer retention periods. In accordance with Executive Order 11246, federal contractors or subcontractors with 150 or more employees and at least $150,000 in federal contracts or subcontracts must retain their hiring records (including applications and resumes for all candidates) for two years from when the hiring decision was made. Any federal contractors or subcontractors with fewer than 150 employees and/or less than $150,000 in contracts must retain hiring records for only one year. There are many other laws requiring the retention of employment-related records (such as leave records, wage and hour records, tax records, retirement and pension records, I-9 forms, OSHA illness and injury records, etc.) for more than one or two years. The full breath of applicable laws, retention periods, and covered documents is beyond the scope of this article.

CONCLUSION

The saying goes that every termination is actually a bad hire decision. Hopefully, with forethought and planning all (or most) hiring decisions can be successful. The EEOC has stated that it plans to focus its investigative and enforcement efforts on the recruiting and hiring process, most notably in background screening, testing, and discrimination areas. Employers will do well to examine each step in their hiring process, from initial draft of the job description through the recruiting, screening, and hiring of individuals to ensure that an offer was extended to the most qualified candidate in a wide applicant pool. Even then there is no guarantee, however, that the right person was selected, but a thoughtful hiring process goes a long way to guaranteeing the least amount of legal risk during the hiring process.

NOTES

1. 15 U.S.C. §§ 1681a *et seq.*

2. In addition to the risk of enforcement actions by the federal government, employers may face private actions by applicants or employees for negligent or willful noncompliance with the FCRA's requirements. *See* 15 U.S.C. § 1681o; 15 U.S.C. § 1681n. Actual damages could include out-of-pocket expenses, backpay, front pay, and compensation for emotional distress. Nominal and punitive damages may be awarded for willful noncompliance even in the absence of actual damages.

3. "Employment purposes" is broadly defined to cover virtually every aspect of the employment relationship, including using a consumer report "for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." 15 U.S.C. § 1681a(h).

4. A "consumer reporting agency" is any person or entity which "for monetary fees, dues, or on a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties …." 15 U.S.C. § 1681a(f).

5. 15 U.S.C. § 1681a(d).

6. *See* 15 U.S.C. § 1681a(e).

7. *See* 15 U.S.C. § 1681b(b)(2)(A).

8. *See* 15 U.S.C. § 1681d.

9. *See* 15 U.S.C. § 1681b(b)(2)(A).

10. *See* 15 U.S.C. § 1681b(b)(3).

11. *See* 15 U.S.C. § 1681m(a).

12. *See* 15 U.S.C. § 1681w.

13. *See* 16 C.F.R. § 682.3.

14. *See* SHRM, Background Checking: Conducting Criminal Background Checks, slide 3 (Jan. 22, 2010).

15. 479 F.3d 292 (3d Cir. 2007).

16. 549 F.2d 1158 (8th Cir. 1977).

17. *See* Cal. Lab. Code §§ 432.7, 432.8.

18. *See* 2 C.C.R. § 7287.4(d).

19. *See* M.G.L.A. 151B § 4(9).

20. *See* M.G.L.A 151B § 4(9½); Haw. Rev. Stat. § 378-2.5(b).

21. *See* Phila. Code Tit. 9, Chap. 9-3500.

22. 18 Pa. C.S.A. §§ 9101 *et seq*.

23. *See* New York Corrections Law Article 23-A, §§ 752, 753. New York employers must post a copy of Corrections Law Article 23-A in a "visually conspicuous manner" in "a place accessible" to all employees. In addition, both before undertaking a criminal background check on an applicant and upon receipt of a report containing information of a criminal conviction, the employer must supply the applicant with a copy of Corrections Law Article 23-A. *See* N.Y. Labor Law § 201-f; N.Y Gen. Bus. Law §§ 380-c(b)(2), 380-g(d).

24. *See* New York Exec. L. § 296(16).

25. Federal bankruptcy law affords some protection to individuals who have filed for bankruptcy or are associated with someone who has. Pursuant to Section 525(b), private employers may not discharge an employee because he or she files for bankruptcy. *See* 11 U.S.C. § 525(b). The question of whether private employers may consider an applicant's bankruptcy status when making a hiring decision is less settled. However, most courts have concluded that the bankruptcy code does not prevent private employers from refusing to hire job applicants because they filed for bankruptcy protection. *See, e.g.,* Rea v. Federated Investors, 627 F.3d 937 (3d Cir. 2010) (holding that Section 525(b) of the Bankruptcy Code, which applies to private employers, does not prohibit discrimination in the denial of employment, *i.e.*, failure to hire).

26. *See* 42 U.S.C. §§ 2000e *et seq*.; 29 U.S.C. §§ 621 *et seq*.; 42 U.S.C. §§ 12101 *et seq*.; 42 U.S.C. §§ 2000ff *et seq.;* 38 U.S.C. §§ 4301 *et seq*.

27. N.Y. Lab. Law §§ 201d(2)(a)(c), (3)(a).

28. *See, e.g.,* N.J. Stat. Ann. § 34:6B-1 (prohibiting New Jersey employers from refusing to hire or otherwise discriminate against any person because that person does or does not smoke or use other tobacco products).

29. *See* Md. Code, Labor & Employment § 3-712; 820 ILCS 55/10; Cal. Labor Code §§ 980 *et seq*.

30. *See* Pietrylo v. Hillstone Restaurant Group, 2009 WL 3128420 (D.N.J. Sept. 24, 2009).

31. 41 C.F.R. § 60-3.7; MOCHA Society, Inc. v. City of Buffalo, 689 F.3d 263, 277 (3d Cir. 2012).

32. Brunet v. City of Columbus, 1 F.3d 390, 412 (6th Cir. 1993); Ashton v. City of Memphis, 49 F. Supp. 2d 1051, 1061 (W.D. Tenn. 1999).

33. Lewis v. City of Chicago, 130 S. Ct. 2191 (2010).

34. Ricci v. DeStefano, 557 U.S. 557 (2009).

35. Briscoe v. City of New Haven, 654 F.3d 200 (2d Cir. 2011).

36. 42 U.S.C. §§ 2000e-2(h).

37. 2:07 cv 00394 (N.D. Ala., July 17, 2007).

38. 2012 WL 4530594 (D. Mass., Sept. 28, 2012).

39. 2011 WL 5147028 (M.D. Ala., Nov. 1, 2011).

40. 2:12 CV 00217 (S.D. Tex., Sept. 19, 2012).

41. 42 U.S.C. § 12112(b)(6), (7).

42. EEOC v. Aurora Health Care Inc., 2:12 CV 00984 (E.D. Wisc., Sept. 26, 2012).

43. EEOC v. Health Partners, Inc., 2:11 CV 12024 (E.D. Mich. May 30, 2012).

44. EEOC v. Kronos, Inc., 2012 WL 4040258 (3d Cir., Sept. 14, 2012).

45. Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992).

46. EEOC v. US Steel Corp., 10 cv 1284 (W.D. Pa., July 23, 2012).

47. EEOC v. Dura Automotive Systems, Inc., 1:09 cv 0059 (M.D. Tenn., Aug. 31, 2012).

48. EEOC v. Hussey Copper, 08 cv 809 (W.D. Pa., Feb. 15, 2011).

49. 42 U.S.C. § 2000ff,

50. EEOC v. Hussey Copper, 08 cv 809 (W.D. Pa., Feb. 15, 2011).

51. Omulepu v. U.S. Peace Corps, 1:12 CV 00988 (S.D.N.Y., Feb. 7, 2012).

52. 29 C.F.R. Part 1605.

53. 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

54. 1:11-cv-02766 (D. Md., Aug. 6, 2012).

55. 3:12-cv-3169 (N.D. Tex., Aug. 22, 2012).

56. Lee v. A&F Freight Sys., Inc., 22 F.3d 1019 (10th Cir. 1994).

57. Durant v. NYNEX, 101 F. Supp. 2d 227 (S.D.N.Y. 2000).

58. Bruff v. North Miss. Health Serv., 244 F.3d 445 (5th Cir. 2001).

59. 4:11-cv-00395 (E.D. Miss., Feb. 21, 2012).

60. 2012 U.S. App. LEXIS 14524 (3d Cir., July 16, 2012).

61. *See, e.g.*, Kallail v. Alliant Energy Corp. Services, Inc., No. 11-2202, 2012 WL 3792609 (8th Cir., Sept. 4, 2012) (plaintiff terminated after refusing to work rotating shift because of diabetes. Affirming summary judgment for employer on ADA claim and holding, based on job description, that rotating schedule was essential function of plaintiff's position.); Robert v. Board of Cnty. Comm'rs of Brown County, No. 11-3092, 2012 WL 3715311 (10th Cir., Aug. 29, 2012) (Affirming summary judgment for employer. Holding that plaintiff was not a qualified individual with disability because she could not perform essential function of job. On essential functions inquiry, court relied on job description.)

62. Rudin v. Lincoln Land Community College, 420 F.3d 712 (7th Cir. 2005).

63. *See* Hunter v. United Parcel Service, Inc., No. 11-3186, 2012 WL 4052403 (8th Cir., Sept. 17, 2012) (Affirming summary judgment for UPS. Transgendered applicant brought failure to hire claim based on non-conformance with gender stereotypes. Interviewers at UPS instructed to look at each applicant's employment history and interview responses. UPS rejected applicant because of problematic history and poor responses. Court found that employers are entitled to rely on applicant performance during interviews and objective factors like job history.).

64. *See* Hernandez v. Wilsonart International, Inc., No. 11-13726, 2012 WL 1255038 (11th Cir., Apr. 16, 2012) (Hispanic applicant brought Title VII failure to hire claim. Company rejected the plaintiff because the plaintiff omitted verifiable work history from the application and had the least work experience of all applicants. Affirming summary judgment for employer).

65. *Id.*

66. *See* Wage Theft Prevention Act, NY Labor Law § 195.1.