Pitfalls of Hiring and Firing Talent, Including Social Media Concerns

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Outline

• Hirer Beware: The Life Cycle of Employment Relationships
  • Social Media in Hiring
  • Criminal Background Checks
  • FCRA
  • Legalization of Marijuana
  • FLSA Current and Proposed Changes
  • Independent Contractor – DOL New Definition
  • Co-employers
  • Social Media – What You Need to Know

PITFALLS THROUGHOUT EMPLOYMENT

Risk of exposure to liability exists throughout the life cycle of the employment relationship:
  – Recruiting
  – Application
  – Pre-Employment Screening
    • Criminal Background Checks
    • Credit Checks
    • Drug Testing
PITFALLS THROUGHOUT EMPLOYMENT (cont’d.)

Risk of exposure to liability exists throughout the life cycle of the employment relationship:
- Designation of Employee
  - Exempt/Non-Exempt
  - Independent contractor
- Co-Employer
- Wage & Hour Issues
- Social Media Concerns
- Termination

RISKS BEGIN DURING RECRUITMENT

• Use of Hiring Software
  - Software (such as Monster) considers, ranks and identifies candidates.
  - Increases risk of Disparate Impact Claims.
  - Easier to obtain Class Certification.

• How to minimize risk:
  - Use Randomizer tools

RISKS BEGIN DURING RECRUITMENT (cont’d.)

Risks of Using Social Media:

As a Recruiting Tool
  - May result in excluding certain groups that do not have access to social media (Disparate Impact)

As a form of Background Check
  - May learn that employee is in a protected category, giving rise to inference of discrimination
  - May give rise to other claims (violation of privacy)
RISKS BEGIN DURING RECRUITMENT (cont’d.)

- Use of Social Media:
  - How to minimize risk:
    - Do not recruit exclusively through Social Media
    - Avoid checking applicant’s social media until after the interview

ISSUES WITH APPLICATIONS

- Questions on applications that ask about an applicant’s criminal background are problematic
  - Ban the Box laws have been enacted in many states and municipalities that prohibit any pre-offer inquiry into an applicant’s criminal background.
  - EEOC guidance on the use of criminal background checks also discourages any pre-offer inquiry.

What You Should Do: Review Applications

- Remove questions about arrests.
- Consider removing any question regarding criminal history from applications.
- If applicable, indicate on the application that successful candidates may be required to undergo a criminal background check.
What You Should Do: Review Applications

- Alternatively, should you elect to continue to ask the general question about convictions, include a statement on the application indicating that a conviction is not an automatic bar to employment, then subsequently conduct an individualized assessment.

- Create new individualized applications asking only about convictions related to the job in question and conduct an Individual Assessment.
  1) Nature and Gravity of the Offense/Conduct
  2) Amount of time that has passed since the Conviction/Offense
  3) Nature of the Job
- Act in a manner that shows individual assessment— not categorical disqualification for conviction

Individualized Assessment

Best Defense If Using Criminal Background Screens

Individualized assessment generally means:
- Employer informs the individual that he may be excluded because of past criminal conduct;
- Provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and
- Considers whether the individual’s additional information shows that the policy as applied is job related and consistent with business necessity.
Individualized Assessment (cont'd.)

• The individual’s showing may include information that:
  – The individual was not correctly identified in the criminal record, or that the record is otherwise inaccurate;
  – The facts or circumstances surrounding the offense or conduct;
  – The number of offenses for which the individual was convicted;
  – Older age than at the time of conviction, or release from prison;
  – Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
  – Shows the length and consistency of employment history before and after the offense or conduct;
  – Rehabilitation efforts, e.g., education/training;
Individualized Assessment (cont’d.)

• The individual’s showing may include information that:
  – Employment or character references and any other information regarding fitness for the particular position; and
  – Whether the individual is bonded under a federal, state, or local bonding program.

Individualized Assessment (cont’d.)

Employers Can Also Use It As a Defense

Individual must be given an opportunity to explain the criminal conviction

• Require written explanation from individual
  – If not truthful then independent reason not to hire and could help to limit damages in litigation
  – Failure to provide information could be used as reason to exclude

Individualized Assessment (cont’d.)

Individual must be given an opportunity to explain the criminal conviction

• Have individuals obtain certified records if they dispute findings of the background check investigation or provide written explanation as to why the conviction would not impact ability to perform the job
  – Failure to obtain records or to explain their position could be a reason to exclude and help limit damages
USE OF CRIMINAL BACKGROUND CHECKS

Exclusion for Criminal Conviction Must Be Job Related and Consistent with Business Necessity

- Title VII shifts the burdens to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."

- Based on disparate impact theory of discrimination

How Can Individual Assessment Work to Employer’s Advantage? (cont’d.)

- **Key Point:** Policy must be based on objective factual data that an employer can point to
  - EEOC will consider
  - Jury might consider

If You Don’t Conduct Background Checks

Weighing the Risks

- Damage to reputation
- Economic loss due to theft
- Bad working environment
- Claims of Negligent hiring/retention

In light of these risks, many employers elect to use criminal background checks as a screening and investigative tool.
The Fair Credit Reporting Act (FCRA)

Contrary to popular belief, this federal law doesn’t cover just credit background checks. It covers any background report, such as driving records and criminal records obtained from a “consumer reporting agency” (CRA).

The Fair Credit Reporting Act (FCRA)(cont’d.)

If an employer retains a company to perform pre-employment screening services including criminal history checks, identification and Social Security number checks, education verifications, employment verifications, and reference checks, such activities do involve the provision of consumer reports since they touch upon an individual’s “character, general reputation, personal characteristics, or mode of living.”

The Fair Credit Reporting Act (FCRA)(cont’d.)

Further, the company providing the criminal history check is a “consumer reporting agency” (“CRA”) as defined in the FCRA.
**Duties Under the FCRA**

- If an employer acquires a report for employment purposes, including a criminal history report from a CRA, the employer has certain duties under the FCRA.

- The employer is required to:
  1) Disclose to each affected employee (or applicant) that the employer is obtaining a consumer report for employment purposes and to
  2) Obtain the employee’s or applicant’s written permission before a report is obtained.

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**Duties Under the FCRA (cont’d.)**

- Before any adverse action (including refusal to hire) is taken based on the information in the report, Section 604(b)(3) of the FCRA requires the employer to provide to the consumer a copy of the report and the summary of the employee’s or applicant’s rights prescribed by the FCRA.

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**Duties Under the FCRA (cont’d.)**

Applicants’ Rights:

- Opportunity to contact the employer and the consumer reporting agency to dispute or explain information in the report that the applicant believes is inaccurate or incomplete.

- Once an adverse action is actually taken, the employer must also comply with Section 615(a) of the FCRA and provide an adverse action notice to the applicant.
How the Legalization of Marijuana Impacts Employers

As of December of 2014, 24 jurisdictions had laws that legalize use of marijuana for medical purposes.

Five of those jurisdictions—Colorado, Washington, Oregon, Alaska, and the District of Columbia—have gone so far as to legalize the drug for recreational use. Similar legislation is pending or under consideration in a number of other states.

Connecticut, Maine and Rhode Island have laws prohibiting organizations from discriminating against workers solely based on their status as medical marijuana patients. Delaware, Minnesota and Arizona go further and bar employers from discriminating against registered and qualifying patients who test positive for marijuana, with an exception of employees who are impaired in the workplace.
Federal Law:

Still classifies marijuana as a Schedule I drug with no legal use. Under Federal regulations, several classes of employees must undergo regular testing for marijuana.

For example, DOT has issued guidance stating that “It remains unacceptable for any safety-sensitive employee subject to drug testing under the DOT’s regulations to use marijuana.”

That includes pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains and pipeline emergency response personnel, among others.

No state law requires employers to permit drug use in the workplace or tolerate employees who report to work under the influence.
How the Legalization of Marijuana Impacts Employers (cont’d.)

Most state statutes expressly carve out exemptions for employers that prohibit any use of marijuana in the workplace, or on the employers’ premises, as well as any on-the-job intoxication.

A few jurisdictions have also produced case law supporting an employer’s right to terminate employment when an employee tests positive for marijuana on the job.

Many Unanswered Questions:

Can employer discipline an employee for off-hours and off-site use or influence, when it is pursuant to a valid prescription (in medical marijuana states), or for off-hours and off-site recreational use (in recreational marijuana states)?

Could the use of marijuana be required as a reasonable accommodation under the ADA?

Can employer discipline an employee for public portrayal on social media or otherwise depicting the employee using marijuana?

What if you are a Federal Contractor governed by Federal Laws including the Drug Free Workplace Act?
Case in Point: *Coats v. Dish Network, LLC.* (Colorado)
The employer terminated the employment of a quadriplegic who suffered from debilitating muscle spasms and possessed a valid medical marijuana prescription.

The termination decision was based on the employee’s positive test for marijuana use even though he was never under the influence of the drug on company premises.

In the employee’s lawsuit for wrongful termination under Colorado’s “Lawful Activities” law (the CO LA Law), which prohibits termination for off-the-clock legal behavior, the Colorado trial court dismissed, ruling that the employer had acted lawfully.

The Court of Appeals agreed, reasoning that the employment termination was lawful because marijuana use is illegal under federal law and thus could not be considered “lawful activity” under the CO LA Law, even though it is explicitly legal under the state’s marijuana law.

The ruling was affirmed by the Colorado Supreme Court.
How the Legalization of Marijuana Impacts Employers (cont'd.)

What can employers do?

• Revise policies to require compliance with Federal Law.
• Review states laws on discrimination against marijuana users; make sure policies are consistent with those laws and state prohibit "any detectable amount of drugs that are illegal under state or federal law."

• Review policies to make sure they clearly explain expectations regarding impairment, use of marijuana outside of company time and drug testing.
• If an employee tests positive for marijuana and presents a medical marijuana card, then consider having interactive disability discussion per ADA. Consider alternatives the marijuana, including leaves of absence, substitute medications.

• Consider policies in the alternative to zero tolerance - much like alcohol use - all off-site use for employers not in safety-sensitive positions, but prohibit an employee from reporting to work impaired or bringing marijuana to the workplace.
• Train supervisors and managers.
• Consult with drug testing vendors to stay abreast of advances in marijuana testing and to ensure a testing program that complies with state law.
Fair Labor Standards Act (FLSA)

Minimum Wage and Overtime Pay

Fair Labor Standards Act of 1938 (FLSA):
• Prescribes standards for the basic minimum wage and overtime pay
• Enforced by US Department of Labor
• Minimum wage and overtime cannot be waived by an employee

Fair Labor Standards Act (FLSA) (cont’d.)

Minimum Wage
• The current federal minimum wage for covered nonexempt employees is $7.25 per hour
• Individual states can set higher minimum wage
  $7.25 in Virginia
  $8.25 in Maryland (effective 7/1/15)
  $10.50 in the District of Columbia (effective 7/1/15)

Fair Labor Standards Act (FLSA) (cont’d.)

Overtime Pay
• Must pay one and one half times an employee’s regular pay for hours worked over 40 in a workweek for every employee that is not exempt
• Certain exemptions apply to specific types of businesses or specific types of work
Fair Labor Standards Act (FLSA) (cont’d.)

Overtime Pay

Who is exempt from overtime?

- Exemptions: employees in an Administrative, Executive, Professional, Computer and Outside Sales capacity

- Current Salary level test: Employees who are paid less than $23,600 per year ($455 per week) are nonexempt

Fair Labor Standards Act (FLSA) (cont’d.)

Overtime Pay

How do you calculate overtime?

- Workweek: A fixed and regularly recurring period over seven consecutive days. Typically, Sunday to Saturday

- Regular rate: Total pay in workweek divided by total hours worked. Cannot be less than minimum wage and excludes vacation pay, premium pay, discretionary pay, discretionary bonuses, and gifts.

Fair Labor Standards Act (FLSA) (cont’d.)

Overtime Pay

Recordkeeping:

- Employer is required to keep payroll records at least three years and time records for two years.
Overtime Pay

- Proposed Changes increase Salary level test to $50,440 per year ($970 per week) — would extend overtime protections to nearly 5 million white collar workers within the first year of its implementation

- Changes to definitions of exemptions also expected.

WHAT DO EMPLOYERS NEED TO DO?

- Check Job Salary and Classifications
- Modify salary and/or job duties in light of proposed changes

Fair Labor Standards Act (FLSA) (cont’d.)

FLSA Lawsuits Increasing at Alarming Rate

- There was a record high for federal wage and hour lawsuits filed under the Fair Labor Standards Act during the 2013-2014 year. 8,126 FLSA cases were filed between April 1, 2013 and March 31, 2014, according to data from the Federal Judicial Center.

- That is almost 5 percent more than the number of lawsuits filed in the prior year’s period.
Fair Labor Standards Act (FLSA) (cont'd.)

FLSA Lawsuits Increasing at Alarming Rate

• This was the seventh straight year of increases in FLSA cases.

• FLSA cases have jumped 438 percent since 2000.

MORE CHANGES TO CLASSIFICATIONS
INDEPENDENT CONTRACTORS

The Department of Labor has issued an “Administrator’s Interpretation” that substantially alters the definition of Independent Contractors.

• Applies an “Economic Realities Test” - key inquiry is whether a worker is economically dependent on the employer, thereby making the worker an employee. Determining the economic independence of a worker should occur on a case-by-case basis, using a multi-factor test that has been developed by a series of federal court decisions.

MORE CHANGES TO CLASSIFICATIONS (cont'd.)

Factors that should be customarily examined include:

• the extent to which the work performed is an integral part of the employer’s business;

• the worker’s opportunity for profit or loss depending on his or her managerial skill;

• the extent of the relative investments of the employer and the worker;
MORE CHANGES TO CLASSIFICATIONS (cont’d.)

Factors that should be customarily examined include:

• whether the work performed requires special skills and initiative;
• the permanency of the relationship; and
• the degree of control exercised or retained by the employer. (Prior Standard)

MORE CHANGES TO CLASSIFICATIONS

• An agreement between an employer and a worker designating or labeling the worker as an independent contractor...” is not relevant to the analysis of the worker’s status.”

RISKS TO EMPLOYERS

• O’Connor v. Uber Technologies – Uber drivers in San Francisco filed class action claiming they were improperly classified as independent contractors.
• Primary issue in the litigation is whether Uber drivers are independent contractors, as the company claims, or employees entitled to unemployment and workers’ compensation as well as the right to unionize.
• Potential exposure to future wage/hour litigation
Joint Employers Redefined (Co-Employers)

NLRB decision is *Browning-Ferris Industries of California, Inc.* articulated a “new” test to analyze joint employer status:

The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms or conditions of employment.

Joint Employers Redefined (cont’d.)

Relevant facts to consider under this test include the roles that companies play with regard to:

- hiring, firing, discipline, supervision and direction;
- wages and hours;
- scheduling, seniority and overtime;
- assigning work;
- determining the manner and method of work performance

RISK TO EMPLOYERS

- Increased liability exposure for adverse employment activities
- Unionization for wage/hour claims
- Increased exposure for wage/hour claims
- Legal responsibility for additional workforce
WHAT CAN EMPLOYER DO

• Review all contracts for outsourced job functions
• Make certain in compliance with new requirement – Co-determine standard
• Indemnity provisions in all contracts with staffing/outsource companies

Social Networking

“Social networking” means communicating with others over the Internet for social, professional, or other purposes on sites such as Facebook, Twitter, LinkedIn, Instagram and YouTube.
• It also includes participation on media or news sites which permit readers to post comments. Social networking also includes authoring or posting to blogs.

Social Networking (cont’d.)

Employee use of Social Networking Sites poses many risks:
• Harassment, discrimination, defamation
• Breach of confidentiality
• Inadvertent creation of attorney client relationships
• Waiver of Attorney/Client privilege
• Trademark/Copyright infringement
Employee use of Social Networking Sites poses many risks:

- Evidence of retaliation - Employees of the Coyote Ugly bar sued for alleged violations of the wage and hour provisions of the Fair Labor Standards Act, and the court held that the reactions by management on Facebook were sufficient to state claims for retaliation. Stewart v. CUS Nashville (M.D. Tenn. Feb. 6, 2013)

Employers can minimize risks by implementing Social Networking Policies that apply on and off the job.

- Clarify use at work – best practice is to limit use to work related while at work.
- Specify that use of social media, even if strictly personal, is governed by all employment policies.
  - Discrimination and harassment prohibited
  - Protect Confidential and Proprietary Information
  - Protect Attorney/Client privilege.
  - No right to privacy if accessed on Employer network – discoverable.
Social Networking Policies (cont’d.)

• Clarify that employees are not authorized to speak on behalf of the Employer on personal networking sites. Require employees to obtain approval prior to publishing or commenting on a matter, or to include disclaimers making it clear that the employee is expressing views that personal and not those of the Employer.

• Clarify policy on ownership of contact information. (Example, LinkedIn).

Social Networking Policies (cont’d.)

• Many networking sites ask users to import contact information *en masse* from their contact lists, and some sites attempt to do so surreptitiously.

• To protect client and company confidential information, do not allow employees to export or upload any client contact information, or to export or upload any contact information obtained from Employer’s contacts database, address book, or other source maintained by the company.

Social Networking Policies (cont’d.)

• Require Compliance with Trademark and Copyright Laws.

• Require employees to report violations of the Employer’s Social Networking policy.
Social Networking Policies (cont’d.)

• Avoid blanket prohibitions about discussing confidential company information.
• NLRA – employees must be permitted to discuss working conditions, protected concerted activity.

Social Networking Policies (cont’d.)

• Prior to disciplining an employee for making a statement on social media, make sure the statement could not be considered “protected concerted activity” – no matter how offensive. *Pier Sixty, LLC, 362 NLRB 59* (March 31, 2015)

Social Networking Policies (cont’d.)

• Employee posted on Facebook that his supervisor “is such a NASTY MOTHER F—ER don’t know how to talk to people!!!!!!! F—k his mother and his entire f—ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!”
• NLRB held that the post was protected, and that termination of the employee violated the NLRA.