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2018 FISHER PHILLIPS ANNUAL LABOR AND EMPLOYMENT LAW SEMINAR
JUNE 15 | FORT LAUDERDALE

Recruitment, Hiring And Onboarding

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What Will We Cover?



- Job Posting/Job Description
- Employment Application
- Interview Process
- Pre-Employment Screening
- Offer & Introductory Period

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NOW HIRING!

JOB POSTINGS/DESCRIPTIONS

Case Study



It's an exciting time at ToyMania corporation! Its biggest competitor has gone out of business and the team is keen on using this opportunity to grow rapidly. ToyMania is outsourcing its manufacturing to Asia and will need to hire a Production Associate to serve as the liaison for its manufacturing partners in China. Eager to get the ball rolling, the Vice President of Human Resources, Milton Bradley, created a job posting that sets forth the following minimum qualifications: 1) must have at least 10 years of international manufacturing experience; 2) must be Chinese; and 3) must be in excellent health due to the need for extensive international travel.

Do you see any issues with the job posting? If so, what are they?

Federal and State Laws Prohibit



- Any express statement of preference based upon membership in a category protected by law
- Use of any word, term, phrase or expression which tends to influence, persuade or dissuade, encourage or discourage, a candidate who is a member of a category protected by law

Categories Protected by Law



- Race
- Religion
- Sex
- Pregnancy
- National Origin and Ancestry
- Disability
- Age
- Marital Status
- Veteran Status

Qualifications/Language



- Impermissible:
 - Must be Chinese
 - Native Spanish Speaker
- Permissible:
 - Fluent in Chinese
 - Fluent in Spanish

Qualifications/Work Authorization



- Impermissible:
 - Must be a U.S. citizen (unless government requirement)
- Permissible:
 - Must be authorized to work in the U.S.

Qualifications/Diversity



- Impermissible
 - Minority Candidate Preferred

- Permissible
 - Equal Opportunity/Affirmative Action Employer: All qualified individuals, including minorities, women and people with disabilities, are encouraged to apply.

Age-Related Requirements



- Impermissible
 - Recent College Graduate

- Permissible
 - 1 to 2 years experience
 - Recent training and/or experience in [List subject]

Physical vs. Attendance



- Impermissible
 - Excellent Health Required
- Permissible
 - Regular attendance is an essential function of the position

Other Potential Legal Issues



- Job Descriptions/Postings are evidence in legal claims:
 - Failure to Hire or Promote
 - Failure to Accommodate a Disability
 - Termination
 - Overtime pay (exempt status)
- A well-written, up-to date job description/job posting reduces risk

Essential Functions



- Add those other, important aspects of the position to the job description/posting that you assume everyone knows but which are typically unstated:
 - Ability and judgment to supervise 30 second grade children
 - Ability and judgment to interact and communicate appropriately with other employees, customers, and supervisor
 - Ability to be at work regularly and on time

Disclaimers



- Add language to the job description to permit the employer to add, change, and interpret the position
 - The employer shall, in its discretion, modify or adjust the position to meet the company's changing needs
- Add language to clarify that the job description is not a contract
 - This job description is not a contract and may be adjusted as deemed appropriate in the employer's sole discretion

Disability Claim



- The Company is not required to hire or retain someone who cannot perform the **essential functions** of the job.
- The EEOC will look at **“written job descriptions prepared before advertising or interviewing applicants for the job”** to determine whether a particular function is essential.
- Qualification standards must be job-related for the position and consistent with business necessity.

EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007)



- Court held that a jury trial was required to determine whether Wal-Mart failed to hire an applicant with mobility limitations caused by cerebral palsy.
- The EEOC established that Plaintiff was “qualified” for the positions of greeter and cashier because job description stated: “no experience or qualifications is required.”

Application for Employment

Please accommodate persons with disabilities in the hiring process. If your disability prevents you from completing this application, please let us know, and we will provide assistance.

ng _____ Date of Application _____ Date Available _____

First Name _____ Middle Initial _____

City _____

Are you 18 years of age or over?
 Yes No If No, Date of Birth _____

Education _____

THE APPLICATION

Case Study



In response to its posting, ToyMania receives numerous inquiries from potential applicants. ToyMania has not had their counsel review their application since it opened its doors in 1990. However, Mr. Bradley does not want to lose any good candidates and decides it is better to strike while the iron is hot, send out the applications and lock in those potential employees!

Geoffrey Giraffago, who was recently laid off, submitted an employment application that set him apart from the rest.

Take a look at Geoffrey's application and let me know if you see any concern.

The Right Application



- Review responses carefully
- Verify information
- Do not write on the application
- Don't accept just a resume
- Do not keep active indefinitely
- Require a complete application
 - Including re-hires!
 - Including high level applicants

Screening For Potential Problem Employees



- Incomplete responses
- Employment gaps
- Job hopping
- Career changes
- Declining pay
- "See resume"
- Reasons for leaving
 - Laid off/terminated/resigned/personal
- No references
- Transportation/other job conflicts
- Missing signatures

Make Sure That You Are Current With The Law



- Ban-the-box laws
- Salary History Bans

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Banning The Box Is Still On The Move...



- Over 150 cities and counties nationwide
- 31 states
- Despite some high profile setbacks, the EEOC is undeterred
- Is being a criminal a protected class?



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Banning The Box - Federal Law?

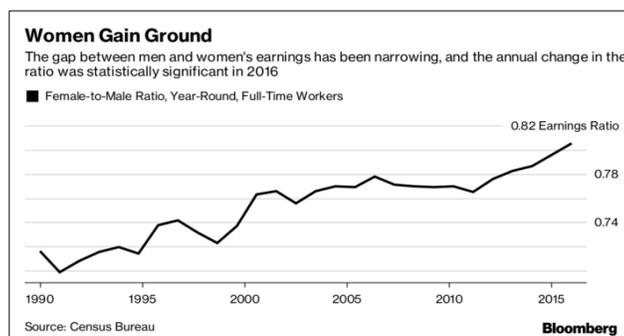


- The EEOC's guidance reflects a **preference** that employers not ask about the criminal conviction on the **application** itself. EEOC wants you to wait until you have otherwise decided the person is qualified (during the "conditional offer" stage). This is to give persons with criminal records a better shot of showing you who they are before you make decisions based on the criminal record alone.

Salary History Bans Are On The Move



The Equal Pay Act has been in place for decades, nevertheless, the "pay gap" persists.



Salary History Bans Are On The Move



- New York (1/9/17)
- New Orleans (1/25/17)
- Puerto Rico (3/8/17)
- Oregon (10/6/17)
- New York City (10/31/17)
- Delaware (12/14/17)
- Albany, NY (12/17/17)
- California (1/1/18)
- Pittsburgh (1/30/18)
- New Jersey (2/1/18)
- San Francisco (7/1/18)
- Massachusetts (7/1/18)
- West Chester County, NY (7/9/18)
- Philadelphia (on hold)

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Salary History Bans Are On The Move



Recent landmark decision by the 9th Circuit Court of Appeals:
Rizo v. Yovino

Ruled that employers **cannot** justify wage differentials between men and women performing “equal work” by relying on prior salary
Cited to cases in the 2nd Circuit, 6th Circuit, 10th Circuit and 11th Circuit as interpreting the EPA in a somewhat similar manner
Noted that the 7th Circuit and 8th Circuit have shied away from issuing such a broad pronouncement

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Salary History Bans Are On The Move



Implications of Rizo

- Salary history may or may not be interpreted as a lawful justification for disparities in pay between men and women performing “equal work” depending upon which jurisdiction you are in
- Calls into question whether employers should **rely** upon salary history in making compensation decisions, even where asking for salary history is not prohibited



THE INTERVIEW

Case Study



Mr. Giraffago comes to your office for an interview. He has excellent qualifications, but due to the extensive travel obligations of the position, you are concerned about his personal time commitments outside of work. As a result, you ask him if he is married and has children. Mr. Giraffago responds that he is and that his wife is battling cancer. You express your sympathy and continue with the rest of the interview. By the end of the interview, you LOVE Mr. Giraffago and do not want him to accept employment elsewhere. Right before he leaves, you try to persuade him to accept the position by telling him ToyMania provides the opportunity for “real” job security and that he can expect a long career at the Company.

What issues, if any, do you see with what transpired during the interview?

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It Takes 10 Seconds To Make A First Impression



- Trust your gut!!! Is this candidate:
 - Qualified
 - Teachable
 - Accepting of supervision
 - Able to lead/follow/take direction
 - 80/20 Rule
 - Positive
 - Goal driven
 - Someone you want to work with FOREVER!



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Interviewing Exercise



GO!

- Are you physically able to perform the functions of this job (with or without a reasonable accommodation)?
- Have you ever held a managerial role?
- How many years of experience do you have in this industry?
- What languages can you speak fluently?
- Can you meet the attendance requirements of this job?

NO GO!

- Have you ever been arrested?
- Is that Ms. or Mrs. Smith?
- What prescription drugs are you currently taking?
- You went to ABC High too? What year did you graduate?
- How old are your children?
- You've been an active leader at church? What church is that?

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"Medical" Questions



- **Pre-offer** → nothing, other than ability to perform essential duties with or without reasonable accommodation
- **Post-offer/Pre-hire** → anything job-related, so long as consistent with business necessity
- **Post-hire** → job-related and consistent with business necessity

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Why Avoid These Questions?

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Liability

If you asked about it or said it in the interview, jury may assume you considered it in your employment decisions

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Statements To Avoid

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- “You can look forward to a long career here.”
- “After your introductory period, you’ll be a permanent employee.”
- “Just do a good job and you won’t have to worry about job security.”
- “Nobody ever gets fired here, unless there’s a really good reason.”

Don’t jeopardize the at-will relationship!

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Documenting The Interview



- Note taking is an important part of the interview process
- Without notes, interviewers recall less than ¼ of facts discussed in interview
- Complete interview notes help the interviewer recall information discussed during interview and help establish employer's effort of fair employment practices
- Notes also can support the legality of your decisions

DO NOT write notes on the application!

Documenting The Interview



- Juries believe documents, not people
 - **If it's important enough to weigh in your decision, document it**
- Make notes during the interview
 - Your handwritten notes can be less than perfect
 - **Convert them to an electronic document ASAP**
 - These should be "perfect"
 - Clean up any sloppy/potentially damaging notes
 - Then, destroy your handwritten notes

Documenting The Interview



- ***Don't Create Problems for Yourself!***

- Never include any “illegal” information in your notes, even if the information was volunteered
- Don't use “codes” to indicate protected characteristics (e.g., age, race)
- If you noted it, the company knew it when it made its decision
 - Could be construed as evidence of unlawful motive in a later lawsuit



PRE-EMPLOYMENT SCREENING

Case Study



You utilize ABC Background Check Co. to conduct the criminal background check on Mr. Giraffago based on his authorization on the employment application. The background check reveals that Mr. Giraffago was arrested in 2005, while in college, for possession of drugs. Your informal policy has been to disqualify any candidate with a criminal record.

Do you see any issues with the pre-employment screening process?

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BACKGROUND CHECKS

Fair Credit Reporting Act



The FCRA

Generally requires individual's consent to background checks

- Establishes specific disclosure and authorization requirements for employers who obtain "consumer reports" regarding applicants or employees for employment purposes
- FCRA duties are triggered when an employer requests a "consumer report"

Understanding When FCRA Applies



FCRA applies when:

- You hire a third party to prepare a consumer report
- Example: Employer retains a professional pre-employment background screening firm to have a report prepared regarding a job applicant

FCRA does not apply when:

- You go directly to public records (no use of third party)
- But, state laws (e.g., IN) may limit even direct investigations
- When a drug lab provides the results of a drug test directly to the employer

Criminal History



- Obtain necessary authorization
- Obtain criminal history for all employees or at least all members of a job class
- Consider time since offense
- Ensure job related
- Be consistent



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DRUG TESTING

Drug Testing



- Require pre-employment test as a condition of initial employment
- Obtain results **before** allowing new hire to start
- Train managers to recognize policy violations
- Maintain and enforce strong but lawful policy



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Case Study



You decide to hire Mr. Giraffago despite the arrest. You e-mail him an offer letter which sets forth Company benefits, including the pension available to employees. Specifically, the letter states, among other things, “[a]fter five years, your pension will be vested.” Unfortunately, Mr. Giraffago is a total dud. His performance is terrible. He arrives late to work every day, has a terrible attitude, and you have received several complaints from the manufacturer regarding their interactions with Mr. Giraffago. You did not have a chance to document any of these issues, but you are not concerned as you are within the introductory period and everyone knows that you can fire an employee without documentation within the introductory period.

Do you see any issues with this decision? What should you do differently?

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Legal Implications of Offer Letters



Don't Throw Away Employment At Will

- Offer letter may create an employment contract
- Letter should be factual, not persuasive
- Don't imply promises, include fluff, etc.
- **“Just the Facts”**



Legal Implications of Offer Letters



Statements To Avoid

- “After one year of satisfactory performance you will be entitled to _____.”
- “After five years, your pension will be vested.”
- “You will be considered a career employee and we look forward to a mutually rewarding relationship.”
- “Your annual salary will be \$_____.”
- “Your job is secure if you perform well.”

Any of these can serve as a basis for arguing that the offer letter created an employment contract

Treat The Introductory Period As Part Of The Hiring Process



Effective Orientation



- Orient on DAY ONE
- Explain basic policies
- Explain grievance procedure, no harassment, and other important policies
- Review benefits
- Review basic work rules
- Set performance expectations

Effective Counseling



- Sets goals and motivates
- Reinforces good performance (or reverse)
- Creates basis for raises, promotion, etc.
- Makes record (good/bad) for legal defense
- Determines if additional training or guidance is needed
- Advises employee of strengths and weaknesses




Final Questions

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THANK YOU
FOR THIS OPPORTUNITY

Candice Pinares-Baez
954.847.4735
cpinares-baez@fisherphillips.com

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