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**CORPORATE LIABILITY****Tips to Avoid Discrimination Lawsuits During the Hiring Process**

BY RON FANO

**A**n industrial file sharpening company in Ohio was ordered to pay \$30,000 to a rejected job applicant to settle a disability discrimination lawsuit filed by the Equal Employment Opportunity Commission. According to the EEOC, employers like Save Edge Inc., paid more than \$300 million for similar employment discrimination violations and litigation in fiscal year 2014.

For most hiring managers, making sure their companies are not part of that statistic is a primary concern.

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According to the lawsuit, however, Save Edge, Inc., found itself included after rescinding a job offer to Anthony Hoover for an operator position after the company learned that he took a prescription drug for a seizure disorder.

Several best practices can help companies comply with regulations and avoid similar discrimination claims and penalties. By putting all candidates through the same documented hiring procedures, hiring managers can protect employers while finding the best people possible to join their companies.

In the U.S., it is illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because he or she complained about discrimination, filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit.

To avoid discrimination claims from the hiring process, employers should heed four best practice tips, in particular:

- 1) Use a standard application form to make the playing field level. Make it accessible in a variety of media (e.g. website, professional/social media sites; on/at job site; paper mail), and don't request information that asks about or implicates an applicant's status in a protected class.
- 2) Pick candidates to interview who most closely match the written job requirements. If possible, have more than one person selecting candidates to interview.
- 3) Don't ask questions on the application or in the interviews that would reveal information in a protected category. Train interviewers to be especially cautious in the small talk that happens before and after the formal interview (e.g. "Are you married?"; "Do you have kids?" "What church do you attend?").
- 4) Know which pre-screening tools to use and how to use them.

## Making the Most of Background Checks

Employers can, and in many cases should, conduct background checks on potential new hires. Background checks actually protect employers from some forms of possible litigation, such as negligence claims, health and safety violations or immigration noncompliance. They can also reduce the risk of employee theft and other honesty crimes and the risk of workplace violence. Hiring managers use background checks to confirm the accuracy of applicants' credentials as well. The 2014 Employment Screening Benchmark Report from HireRight indicated that 88 percent of employers running background checks uncovered a lie on a resume.

Even still, employers must be careful not to discriminate against potential new hires due to the information obtained through background checks. To avoid discrimination claims and EEOC violations, employers cannot treat job applicants with the same criminal records differently based on race, color, religion, sex or national origin. In addition, employers cannot disproportionately exclude certain job applicants with criminal histories even where the employer applies the criminal record exclusions uniformly.

With this in mind, the following are a few ways that employers can mitigate the risk relating to background checks:

- get an applicant's written consent to perform a background check;
- explain that offers of employment are made contingent on the satisfactory completion of a background check;
- develop a written policy for those managers and employees doing the hiring, outlining how background checks should be conducted;
- keep background check information confidential to the fullest extent possible—share information only on a need-to-know basis and only use information for its intended purpose;
- uniformly apply background check standards to all potential employees without regard to race, color, religion, sex or national origin;
- treat arrests and convictions differently;
- consider the amount of time that has passed since the offense, conduct or completion of the offender's sentence;
- consider the nature and gravity of the offense or conduct; and
- consider the nature of the job sought with the particular type of conduct or offense.

The EEOC takes the position that "blanket" exclusions (e.g., refusal to hire anyone with a "felony conviction") is discriminatory, unless a federal law requires the applicant not to have a criminal conviction for the job, such as shipping firearms. The EEOC will have a hard time objecting to the use of the background checks when the employer makes an individualized assessment of an applicant's criminal history.

## Running Credit Checks

Both federal and state laws limit the type of information that employers can obtain through a credit check.

While individual state laws may vary, most provide that employers can check for credit worthiness, standing, capacity and history at least for certain positions. However, there are limits on what can be obtained and there are specific requirements in terms of providing notice that the credit checks are being done and used to make employment decisions.

Under Colorado's Employment Opportunity Act (EOA), employers can use a credit report in making an employment decision (e.g. hiring promotion, reassignment, salary increase or decrease, discipline or termination) when:

- the employer is a bank or financial institution;
- a report is required by law; or
- a report is substantially related to the situation or position, and the employer has a bona fide purpose for requesting or using the information because of job requirements and the applicant received a written disclosure of the bona fide purpose.

If the credit information plays a part in why the applicant didn't get the job, the EOA requires that employers disclose that fact to applicants and tell them what particular information contributed to that decision. The employer has to do this in writing using the same medium in which the application was made. The employer is allowed to ask the applicant to explain any unusual or mitigating circumstances.

## Steer Clear of Social Media In Doing Background Checks

The number of people using social media and the amount of information people divulge online continue to grow. Today's social media landscape includes approximately 284 million monthly active Twitter users, 1.39 billion monthly active Facebook users and 332 million LinkedIn registered users, according to Digital Information World.

We generally advise hiring managers not to access, search or attempt to seek access to any applicant's personal social media sites. More and more states are passing legislation that prohibits employers from requiring applicants to provide access to their social media accounts. Even when states do not prohibit it, using social media in the hiring process is a bad idea. The reason: employers could inadvertently discover information about an individual they cannot legally use in considering an applicant's fitness for a position, such as age, gender, religion, ethnicity, disability or medical condition. Just seeing a picture of the applicant online conveys information that perhaps should not be part of the interviewing process. The other issue is that the information found on these sites may not be reliable or could be misconstrued.

Even if an employer's hiring decision is not based in any way on illegal discriminatory grounds, once the employer has this knowledge about an applicant's protected status, the employer knows facts that it is not allowed to ask on an application or in an interview. Thus, the employer loses an important defense to claims of discrimination—it cannot claim ignorance of a candidate's protected class.

If employers do use social media as part of the screening process, they should:

- develop a written policy with screening guidelines—examples when social media could be useful include awards, publications and industry recognition;
- designate and train a limited number of people who have the authority to screen applicants to use such sites;
- of the information found, only disclose information that relates to the job and does not involve protected status or information; and
- apply screening guidelines with consistency.

The employer that chooses to use social media as part of the screening process may also want to consider only using LinkedIn for such purposes. This is due to the fact that LinkedIn is specifically set up as a business network and therefore more likely to be free from personal information that the employer would want to remain ignorant of in the screening and hiring process.

## Conclusion

Implementing smart, consistent hiring procedures and using screening tools correctly helps employers reduce the likelihood of discrimination claims. But employers must be aware that it is not just having policies that directly discriminate against protected categories that puts companies at risk. Discrimination that occurs when a seemingly neutral policy has a discriminatory effect on a protected class is also actionable. For example, if a company were to decide that it was only going to accept applications through Facebook, such policy, while applicable to all candidates and not directly discriminatory against any particular group, could be deemed to have a discriminatory impact on candidates over a certain age (i.e. those less likely to use Facebook).

Given the many hidden minefields, having an experienced employment law lawyer who can work effectively with human resource managers may be the best protection employers can have for avoiding discrimination claims.