

WHO THE HECK ARE WE HIRING? LEGAL ISSUES WITH ONBOARDING: BACKGROUND CHECKS, PRE-EMPLOYMENT TESTING, AND EMPLOYEE SOCIAL MEDIA

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I. BACKGROUND CHECKS AND FCRA ISSUES

A. How does the FCRA affect hiring?

1. When employers run background checks through a company in the business of compiling background information, they must comply with the Fair Credit Reporting Act (FCRA)
2. What is “background information?”
 - a. Credit reports
 - b. Criminal record checks
 - c. “Consumer report”
3. FCRA Best Practices
 - a. All applicants must sign a background check authorization form.
 - b. Do not seek background information from references or prior employers prior to obtaining this authorization.
 - c. Place information in personnel file, except if name of person making the reference would be disclosed.
4. State-Level FCRA Issues
 - a. In recent years, states have enacted laws that add requirements greater than FCRA policies.
 - i. Arizona, Georgia, California, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, and Washington
 - b. Some states, such as Minnesota and Oklahoma, require an employer to provide the subject of the check an opportunity to check a box to receive any report provided by an FCRA.
 - i. You must be aware of any state-level FCRA requirements before requesting or acting on a background report

5. Notice requirements
 - a. Employers must notify a job candidate before and after adverse action is taken based on information received from a consumer report
 - i. Pre-Adverse Action Report
 - ii. Adverse Action Report
6. FCRA Damages
 - i. Consumers may seek their actual damages arising from an FCRA violation
 - ii. Consumers alleging a willful failure to comply with an FCRA requirement may seek actual, statutory, and punitive damages
 - iii. May recover costs and reasonable attorneys' fees
7. FCRA Compliance Failure Consequences
 - a. David Hellwig v. Walgreen Co.
 - i. Walgreens settled with class-action plaintiffs under FCRA for failing to provide applicants with an FCRA-compliant pre-adverse action notice
 - ii. The company also failed to give applicants sufficient time to respond and disqualified applicants too quickly after receiving background checks
 - iii. Walgreens will pay up to \$918 to each effected plaintiff

II. JOB-RELATED TESTING

- A. What issues can employers encounter when conducting job-related testing?
- B. How can we understand and handle the potential legal issues surrounding the usage of pre-employment testing to evaluate candidates?
 1. Assessing job candidates through testing
 - a. Assessments are general predictors of a candidate's future performance and behavior
 - i. Precautions
 - (A) Should always be used in combination with other tools in the selection process
 - (B) Ensure the assessment has a high degree of validity

- (1) How has the test been externally validated?
- (2) Is it supported through court decisions or used by other large companies?

2. EEOC Testing Guidelines

- a. Title VII of the Civil Rights Act prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on a protected class where the tests or selection procedures are not “job-related and consistent with business necessity.”
- b. Tests must not have a disparate impact on members of a protected class
- c. EEOC adopted the Uniform Guidelines on Employee Selection Procedures or “UGESP” under Title VII
- d. Assists employers with determining the validity of "Selection Procedures"
 - i. Common examples of selection procedures
 - (A) Mental ability (cognitive) tests
 - (B) Mechanical aptitude evaluations
 - (C) Personality inventories
 - (D) Interest and values inventories, interviews
 - (E) Scored background questionnaires
 - (F) Job knowledge exams
 - (G) Job simulations
 - (H) Measures of "job fit"
 - ii. Test validation
 - (A) How are tests validated?
 - (B) Employer must demonstrate validity of the test as it applies to its own workplace and specific job
 - (C) Third-party contractors and qualified experts can provide validation analysis

3. Science-based assessments to screen candidates
 - a. Applicant Tracking Systems
 - b. Leadership Assessments
 - i. Meyers-Briggs Assessment
 - ii. Emotional Intelligence Assessments
 - c. Behavioral and Motivator Assessments
 - i. DISC and Motivators Assessment
 - d. Skills Assessments
 - i. Hard skills
 - ii. Work sample
 - iii. Cognitive ability
4. Hiring assessments and discrimination
 - a. Hiring assessments should not discriminate based on protected characteristics such as race, color, ethnicity, religion, national origin, sex, gender identity, sexual orientation, age, familial status, disability, or genetic information.
 - b. Discrimination risks
 - i. Hiring assessments should measure traits and skills that **are important to job performance.**
 - ii. Assessments based on criteria that are unnecessary to job performance risk creating artificial or discriminatory barriers to employment opportunity.
 - c. Risks of discriminatory hiring assessments
 - i. **February 2024:** Hospital Housekeeping Systems, LLC (HHS), will pay \$520,000 as part of settlement with EEOC.
 - (A) Company required employees to take an Essential Functions Test (EFT) at hire, annually, and upon the return from a medical leave of absence, **even when portions of the test were not job-related.**
 - ii. **August 2020:** Walmart settled a nationwide sex-discrimination complaint with the EEOC for \$20 million.

- (A) Walmart violated Title VII by using a physical abilities test that had a disparate impact on female applicants.
- iii. **May 2016:** Federal investigation resulted in a \$1.85 million settlement for Gordon Food Service for discriminatory hiring practices
 - (A) The investigation revealed that the majority of women weren't passing a strength test, which used used Isokinetic Testing technology to match the physical capability of the worker with the physical demands of the job.
 - (B) Test requirements were based on criteria for coal mining employees
- d. Hiring assessments should be thoroughly and regularly audited before and after deployment for discrimination and job-relatedness.
- e. Widespread integration and unknown impact of artificial intelligence.
 - i. Studies show AI can be discriminatory.
- f. Risks of AI In the Hiring Process
 - i. CVS reached confidential settlement of lawsuit related to use of AI in pre-employment testing
 - ii. Plaintiff learned that his interview was analyzed through a third-party AI platform which used technology to track facial expressions such as “smiles, surprise, contempt, disgust, and smirks,” which then assigned candidates an “employability score.”
 - iii. Employability score included analysis of a candidate’s “conscientiousness and responsibility,” including a candidate’s “innate sense of integrity and honor.”
- g. Risks of AI in the Hiring Process
 - i. Workday sued in novel lawsuit related to AI in the hiring process
 - ii. Plaintiff alleged that the Workday platform used by many large companies to screen job candidates discriminates based on race, age, and disability in violation of Title VII of the Civil Rights Act of 1964 and other federal laws
 - iii. In July, a federal judge in California ruled that the lawsuit may proceed
 - iv. Unanswered questions about liability sharing between vendors and employers

III. EMPLOYEE/JOB CANDIDATE SOCIAL MEDIA

- A. How does social media interact with the hiring and employment process?
1. Social media and the workplace
 - a. 4.3 billion active users of social media worldwide
 - b. November 2022 survey found almost 40 percent of Gen Z in the U.S. spent more than four hours on social media platforms daily.
 - c. 90.4% of Millennials use social media actively.
 2. Screening job candidates' social media
 - a. 70% of employers check out applicants' profiles as part of their screening process, and 54% have rejected applicants because of what they found
 - b. Are you legally allowed to act on this information?
 - c. Is it actually related to job performance?
 - d. 56% of workers think its unethical for employers to scan or scroll through their employees' social media accounts (excluding work-related social media like LinkedIn)
 - e. 30% of workers think that their CEO finding and following their personal social media account is scarier than holding a spider or snake, skydiving, going to the dentist, and blind dates
 3. Considerations with candidates' social media
 - a. Is the employee exhibiting a behavior that would actually affect them in **a work-related context?**
 - b. University of Iowa study found that social media assessments from recruiters could not accurately predict job performance or turnover intentions.
 4. Social media monitoring risks
 - a. Is the employee exhibiting a behavior that would actually affect them in **a work-related context?**
 - b. *Watson v. Phila. Parking Auth., Civil Action 21-1514*: gay man was unlawfully fired as a data analyst at the Philadelphia Parking Authority shortly after supervisors discovered his LGBT status via his Facebook posts.
 5. Can I make them add me on social media?

- a. Michigan employers cannot ask current or prospective employees for passwords or other information in order to access private social media accounts.
 - b. 26 states have laws that address social media privacy and either protect employee privacy or create additional discrimination protections.
6. Negative social media posts from employees
- a. Is this protected concerted activity?
 - i. One or more employees working together to address working conditions
 - b. Does it address the terms and conditions of employment?
 - i. What is the complained about action?
 - c. Employers that discipline employees for actions and comments that fall under protected concerted activities risk committing an unfair labor practice and violating the employee's rights under Section 7 of the NLRA.
7. Failure to take social media seriously
- a. *Okonowsky v. Garland*
 - b. Employer can be liable for a hostile work environment created by an employee's off-work social media posts
 - c. Staff psychologist at federal prison discovered that high-ranking male coworker had created Instagram account
 - d. The co-worker's Instagram posts often referenced their workplace, and multiple posts personally targeted Plaintiff
 - e. Workplace leaders failed to take concerns seriously
8. Failure to take social media seriously
- a. Employers should be aware that they may be liable for their employees' social media activity, even when it takes place outside of work hours and work premises
 - b. How much monitoring is the right amount?
 - c. If brought to my attention, what's important and what's not?
9. Social media monitoring risks
- a. Can a social media policy violate the NLRA?

- b. Could your policy be construed to prohibit discussions of wages or working conditions?
- c. Has your policy been reviewed in light of new NLRA decisions?
 - i. New decisions bring more scrutiny to workplace policies