

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

By: Jordan M. Small, Esq.

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 a 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

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. 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
- 3. 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.
 - 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

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?
 - 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. 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