Critical Mistakes in the Hiring Process

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Why Does it Matter?

✓ Invest $$ and time
✓ Avoid litigation
#1 Mistake

DO NOT GET IN A RUSH!
Challenges Lurk in the Process

- Job Posting
  - Describe Essentials

- Objective Criteria
  - Application

- Interviews
  - Background

- Medical
  - Conditional Job Offer

- HIRE 1-9

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Job Posting Mistakes

• Discouraging certain groups from applying
• Failing to include language identifying as “Equal Opportunity Employment”
• Requiring US Citizenship **
• Using language that suggests a preference for a certain race, gender, age, etc.
  😞 “Looking for a young and enthusiastic team member”
  😊 “Looking for a hard-working team member”
Job Posting Mistakes

• Failing to set out a detailed job description with clear expectations
  • State whether position is exempt or non-exempt under FLSA
  • Essential functions for ADA purposes
  • If essential skill, education, etc., is necessary - say so!
Application Mistakes
Applications Should . . .

- Ensure signature/verification/certification that information is truthful
- Ensure reporting of all convictions or plea agreements
- Ensure explanation of all gaps in employment
- Ensure affirmation that s/he is allowed to work legally in the US
- Ensure affirmation that s/he can lawfully operate a motor vehicle (if required)
- Question:
  - What about reading/writing?
  - What about speaking English?
Interview Mistakes

• Asking inappropriate questions: when in doubt, don’t ask!
  • Are you planning for a family?
• Making guarantees about the job/future employment
• Inconsistent treatment amongst different applicants
• Interview questions: should be identical and can be open-ended
• Objective evaluation criteria
• Is a working interview – compensable?
  • Depends . . .!
Job Interview: Compensable???

• Training and skills tests as part of the interview process may entitle applicants to pay unless the following are ALL met:

- Tasks are for benefit of applicants
- Tasks are similar to vocational school
- Applicants do not displace regular employees
- It is clear that applicants are not entitled to wages
- Applicants are not entitled to a job upon completion of task(s)
- Employer receives no immediate advantage

It is clear that applicants are not entitled to wages
Interview Mistakes
When an Applicant Announces a Pregnancy

- DON’T assume that the employee will be unable to do the job
- DO document the discussion properly, including any accommodations requested
- DO assure compliance with federal and state laws regarding pregnancy leave and post-partum issues
Background Investigation
Mistakes

• Not hiring a good company and/or not conducting thorough backgrounds
• Not contacting every former employer!
Background Investigations
Mistakes:
Criminal Records

• The issue is suitability for your workplace
• Focus on job-relatedness
• Use objective factors to determine if particular past conduct disqualifies an applicant
• Pending cases – underlying facts still matter
• Active warrants – indicative of failure to take care of business
Avoiding Background Check Litigation

- FORMS! FORMS! FORMS!
- Review/Document Screening Process
- Disclosure and Authorization
- Pre-adverse action notice
- Take some time
- Post-adverse action notice
Background Investigations

Mistakes:
Little Errors Can Equal Big Consequences

- Violations of the Fair Credit Reporting Act (FCRA) are serious!

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Mistakes in Final Stages

- Inappropriate Background Checks
- No conditional offer of employment
- Failing to complete I-9 forms after hiring
Conditional Job Offer

• Then, and only then, you can send an employee to a medical examination

• Medical examination of applicant is to determine if s/he can perform essential functions of job
Upon Hiring: E-Verify/I-9 Tightrope

- E-Verify compares information from I-9 against data from Department of Homeland Security (DHS), Social Security Administration (SSA), and Department of State (DOS) records to confirm employment eligibility.

- A case is created, providing a system verification number, and giving an initial case result: Tentative Nonconfirmation or Employment Authorized.
E-Verify/I-9 Tightrope (Cont.)

• In the event of a Tentative Nonconfirmation (TNC), inform employee in private
• Employee should then sign a “Further Action Notice” document explaining the TNC
• Employee may contest results
  • Employer issues a Referral Date Confirmation from E-Verify for the employee to contact the DHS or SSA
  • Employee has 8 federal work days to resolve the matter
  • If resolved, DHS/SSA will update records to reflect a match to I-9
  • If uncontested or unresolved (Final Nonconfirmation), employer may terminate employment.
E-Verify Tips

❖ Post E-Verify Participation Notice posters in English and Spanish
❖ Only use E-Verify after job acceptance and I-9 completion
❖ Only for use with employees hired after November 6, 1986
❖ Use E-Verify only for new hires or rehired employees, not when employment authorization is expired
❖ Keep copies of I-9 documents
E-Verify Tips
(Cont.)

- Do not use E-verify as a prescreening or discriminatory tool
- Do not ask for work authorization documentation after a TNC
- Do not counsel employees on whether or not to contest
- Do not take adverse action if employee does not contest a TNC – Wait for the Final Nonconfirmation or a “DHS No Show”
- Even a simple typo can cause a TNC, so don’t jump to conclusions!
- Use of E-Verify does not replace I-9 responsibilities
Revised version of Form I-9 released July 2017

Mandatory use of updated I-9 beginning September 18, 2017
Remember, just because an individual may not have legal immigration status does not mean they are unprotected under FLSA, Title VII, etc.
Final Thought

It is IMPERATIVE to conduct thorough background checks!
Questions?