


# Employment Law for Human Resource Practice

Chapter 4  
Recruitment, Applications  
and Interviews



# Recruitment <sup>1</sup>

- Assuring non-discrimination in hiring begins at the recruitment process
- To determine whether discrimination has occurred, the firm's applicant pool will be compared to the **relevant labor market** - *the protected class composition of people who are qualified for the type of work in question and reside within a reasonable recruitment area*

# Recruitment <sup>2</sup>

- Employers must use several recruitment mechanisms to avoid discriminatory hiring.
  - Recruitment mechanisms:
    - Want ads and job announcements
      - Wording must be neutral
    - Employment agencies
      - May not discriminate on behalf of employer clients
    - Nepotism, word of mouth hiring
      - Unless workforce is already diverse, tends to recruit similar employees

# Just the Facts

- Wal-Mart has relied heavily on “word of mouth” to hire new truck drivers. If they meet certain requirements, committees composed of current drivers screen them and conduct initial interviews. 4-6% of hired drivers were African American, but 15% of US truck drivers are African American. Are Wal-Mart’s recruiting & hiring practices for truck drivers discriminatory?
  - *Nelson v. Wal-Mart Stores*, 2009 U.S. Dist. LEXIS 3707 (E.D. Ark.)

# Recruiting Foreign Nationals <sup>1</sup>

- H1-B visas
  - Granted to persons in specialty occupations; capped at 65,000.
  - Require a bachelor's degree or higher.
  - Limits the employee's stay to 6 years.
  - Typically, such applicants are systems analysts, engineers, accountants, etc.
- Employers must pay these workers the same pay and benefits as U.S. workers.

# Recruiting Foreign Nationals <sup>2</sup>

- H-2 visas
  - For foreign nationals who come to the U.S. for temporary or seasonal work
    - H-2A visas are for agricultural or logging; 86,000 visas were granted in 2010; more than 1 million are needed
    - H-2B visas are for temporary workers in other industries (but not nurses)
  - Employers using H-2 visas must show that there are not enough U.S. workers, and these will not adversely affect the wages of U.S. workers.

# Applications & Interviews

- In the application process, employers decide:
  - What must be done to apply.
  - Whether applications will be accepted.
  - The period of time for which applications will be accepted.
  - How long submitted applications will remain valid.

# Recordkeeping Requirements

- Employers must retain:
  - Applications & related records for at least 1 year after a hiring decision is made
  - Records regarding people who were hired until a year after they leave employment
  - Data regarding the protected class characteristics of applicants for purposes of affirmative action and adverse impact



## *EEOC v. Target*

- Facts: EEOC sued Target under Title VII for disparate treatment of African Americans for managerial positions. The interviewer repeatedly refused to return calls or schedule interviews with African American applicants on the grounds that he was “too busy,” but did so for other candidates. EEOC also alleged that Target violated Title VII by failing to make and preserve relevant records. The District Court entered summary judgment for Target on both claims.
- Issue: Whether the EEOC has raised genuine issues of material fact so as to avoid summary judgment on both counts.
- Held: Yes. EEOC has provided evidence disputing Target’s evidence of non-discriminatory reasons by contradictory facts and expert testimony, raising questions of material fact.

# Pre-Employment Inquiries <sup>1</sup>

- Employers should not directly inquire about protected class characteristics.
  - Example: asking age, whether U.S. citizen
- Employers should not indirectly inquire about protected class characteristics.
  - Example: asking date of graduation, memberships, workers' compensation claims filed
- Employers who want to track protected class characteristics for affirmative action purposes may do so by a voluntary reporting process.

# Pre-Employment Inquiries <sup>2</sup>

- Avoid questions about requirements or criteria not equally applied to all job candidates, especially those related to gender
  - Examples: questions re children, marital status, child-care arrangements
- The answer to such questions are often received differently depending on whether the candidate is a man or a woman, which can lead to a claim of disparate treatment or adverse impact
- Also, in some states, marital status is a protected class characteristic

# Just the Facts

- A female manager interviewed for a newly created management position, and was interviewed by a male VP. He asked whether she had children, what her child-care responsibilities were, how her family felt about her long commute, and not being home “not caring for the family.” She was not hired, and was told that a male with grown children who could make “a committed move” was hired for the position. A year later, her job was eliminated. Was this sex discrimination?
  - See *Lettieri v. Equant*, 478 F.3d 640 (4th Cir. 2007).

# Pre-Employment Inquiries <sup>3</sup>

- Avoid questions likely to produce adverse impact.
  - Example: Prior arrests, type of military discharge, weight
- Even if an applicant looks like an unlikely candidate, do not discourage the applicant from applying.
- Employers are required to maintain records of applications, including web applications.
- Application process must accommodate the disabled.
  - Assist visually impaired with applications orally or by tape, provide wheelchair access.

# Pre-Employment Inquiries <sup>4</sup>

- Employers should not seek medical information, directly or indirectly, prior to a conditional offer of employment.
  - Example: Disabilities, medical and psychological conditions, medical histories, medications taken, workers' compensation claims filed
- BUT, notice it is NOT a requirement that employers must ask only job-related questions.
  - The law requires only that the employer refrain from asking questions which may elicit information which could be used to discriminate.

# Harrison v. Benchmark Electronics

- Facts: Harrison, a temporary worker, was asked by his supervisor to apply for the position as a permanent employee. He applied & took a pre-employment drug test, which disclosed his use of a barbiturate. He then with the Medical Review Officer, who elicited the information that Harrison suffered from epilepsy since the age of 2, and controlled it with these legally prescribed medications. The MRO cleared him to be hired, but his supervisor (who also attended the MRO meeting) fired him.
- Issue: Whether pre-employment medical inquiries regarding disability may be made when an applicant has a positive blood test for a controlled substance.
- Held: An employer may make pre-employment inquiries regarding whether a drug being used is lawfully prescribed, but may not inquire about the applicant's disability, if any.

# Elements of a Fraud Claim

- Making of a false representation of a material fact.
- Party making statement knew it was false.
- Party intended the other to rely on the statement, and act accordingly.
- The other was induced to act accordingly.
- The other was harmed by reliance on the false representation.



## *Stewart v. Jackson & Nash*

- Facts: An attorney was recruited by a law firm with promises of a prominent role in that firm's environmental law practice. She took the job, but the promised promotion and environmental law practice never materialized. She was fired after two years.
- Issue: Whether the recruiting law firm engaged in fraud in inducing her to accept the position.
- Held: The attorney's claim for fraud was sufficient to withstand the firm's Motion to Dismiss. Case reversed and remanded for trial.

# Just the Facts

- A headhunter approached an employee with news that a competitor of her current firm would offer her a very good compensation package to hire her away. Her supervisor learned of the impending offer. The CEO first told the supervisor to fire her, but on learning that she had not signed a non-competition agreement, reluctantly agreed to a new compensation package for her, in exchange for her signing a non-compete. They assured her the firm was doing well, and she would make her bonus, even though the firm had significant financial difficulties and a negative cash flow. She signed the non-compete. Within weeks, her job was eliminated. Does she have a claim for fraud?
  - *Sweeney v. Marc Global*, 2008 U.S. Dist. LEXIS 11490

# What Would You Do?

- You are interviewing for a secretarial position at your firm and have scheduled interviews sequentially all day one week from today. You believe you have a diverse group of applicants and want to be sure that each has an equal opportunity. What would you do?

## Next:

- Chapter 5 – Background Checks, References and Verifying Employment Eligibility
  - Is it necessary to check the background of every applicant?
  - What, specifically, do you need to check?
- The answers to these questions and more are next.

## *Instructor's Note*

- Instructor's note for What Would You Do?
  - Students should prepare interview questions ahead of time to be asked of all applicants and perhaps consider using a structured interview format so that all applicants are asked the same questions. This may avoid any perception of discrimination in the selection process.