

Welcome to the seventh issue in our series, *Compliance Check 2020*, a monthly publication that will help you perform a self-assessment of your company's compliance with federal, state and local employment laws and regulations.

In this edition, we help you evaluate your company's hiring practices.

Summer is a great time to review and consider your hiring practices, particularly if your company is hiring recent graduates or looking ahead to seasonal hiring later this year. Here are some basic questions that will help you conduct a review to ensure that your practices are compliant with employment laws and regulations.

Applications

☑ **Does your application ask for salary history information?** Some states and local jurisdictions have implemented salary history bans, which are laws that prohibit employers from asking a candidate about his or her prior compensation on the application or during interviews (i.e., pre-offer). Some jurisdictions go even further and regulate whether an employer can rely on a candidate's salary history to set compensation even if it is voluntarily disclosed during salary negotiations, and some require employers to reveal salary ranges to candidates upon request. At least 13 states and numerous local jurisdictions have implemented salary history bans and pay transparency laws in the past few years, and more laws are on deck. You'll want to check your applicable state and local requirements, which can vary depending on whether a company is public or private.

☑ **Does your application ask about criminal convictions?** So-called "ban the box" laws prohibit employers from

asking about criminal convictions prior to making an offer of employment. Even in jurisdictions without such laws, application questions asking candidates to self-disclose criminal convictions should only solicit information about convictions that are job-related to protect against claims under federal and state discrimination laws. Also keep in mind that some state and local jurisdictions prohibit an employer from relying on certain types of convictions to disqualify a candidate, and an overbroad question could solicit convictions that should not be considered in light of those laws. Finally, using a balanced self-disclosure question can minimize the amount of time a talent acquisition professional must spend evaluating whether a candidate should be disqualified due to lack of candor for failing to disclose a decade-old misdemeanor when the conviction itself may not be job-related.

If your company hires workers in many different jurisdictions (and some have salary history bans or ban the box laws and some do not), you'll want to decide whether to tailor your application to the most restrictive jurisdiction, to have one application with jurisdiction-specific carve-outs, or to create multiple applications.

☑ **Is your application accessible to everyone?** For instance, if you only have paper or online applications,

how would you accommodate an individual with a visual disability? Thinking through possible scenarios is a proactive step in making sure all applicants can access your applications.

Background Checks

- ☑ **Do you require a written authorization before obtaining a background check report?** Employers wishing to conduct background checks on prospective hires may do so as long as the company provides proper notice and the candidate authorizes the disclosure first. In addition to complying with the strict notice and disclosure requirements in the Fair Credit Reporting Act (FCRA), be aware that you might also be subject to additional state-specific notice requirements. Even an employer who outsources background checks to a third-party vendor is still responsible for the background check being done correctly. Because applicants often bring class action lawsuits against employers for FCRA violations, it is important to confirm that you (and your vendor) are using a legally compliant disclosure form that has been vetted by your company's legal counsel.
- ☑ **Have you taken the required steps before withdrawing an offer of employment based on the background check?** Before withdrawing an offer of employment based on information in the background check report, an employer must provide a pre-adverse action notice and an adverse action notice. Failure to do so may result in liability under the FCRA.

Interviews

- ☑ **Do you have appropriate privacy protections in place?** If you conduct video or Skype interviews, be aware that some states, like Illinois, have enacted laws targeting employers who conduct video interviews and then use AI technology to analyze the candidate.
- ☑ **Do you have a procedure in place if your company considers a candidate's social media?** It is often tempting to look at applicants' social media accounts

during the hiring process. But doing so may inadvertently reveal protected characteristics. If you are going to review applicants' or interviewees' social media accounts, it should be done through a formal process conducted by an individual who is not the hiring decision-maker.

- ☑ **Are you cautious about discussing physical abilities during the hiring process?** Remember that there are some things you can't ask in an interview setting, such as whether the interviewee has a disability. You can, however, ask applicants to let you know if they require a reasonable accommodation to apply or interview. Ensure that your recruiters and hiring managers are trained in how to properly respond when a candidate mentions a disability during the hiring process.

Offer Letters

- ☑ **Does your offer letter cover all the basics?** An offer letter should outline the prospective employee's salary, benefits and duties, and clarify that his or her status is at-will. The letter should also specify if the offer is contingent upon the candidate passing a background check or drug test, or obtaining and maintaining certain licenses, and whether he or she will be required to sign a confidentiality or non-competition agreement as a condition of hire.
- ☑ **Does your offer letter comply with state-specific requirements?** Make sure you provide all required notices to a new hire, either in the offer letter or using stand-alone forms. Ensure that your offer letter complies with any state requirements. For example, some states, like California and New York, have wage-theft notice requirements that must be met.

FOR MORE INFORMATION

As always, we welcome your questions, feedback or suggestions. Please contact:

Lindsay Nichols, Author

513.352.6512

Lindsay.Nichols@ThompsonHine.com

Megan S. Glowacki, Co-Editor

513.352.6503

Megan.Glowacki@ThompsonHine.com

Heather M. Muzumdar, Co-Editor

513.352.6691

Heather.Muzumdar@ThompsonHine.com

Nancy M. Barnes, Practice Group Leader

216.566.5578

Nancy.Barnes@ThompsonHine.com

This newsletter may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgment of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions.

© 2019 THOMPSON HINE LLP. ALL RIGHTS RESERVED.