

# **AVOIDING LEGAL TRAPS IN THE HIRING PROCESS**

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# THE APPLICATION AND INTERVIEW PROCESS

# TITLE VII OF THE CIVIL RIGHTS ACT

Prohibits discrimination on the basis of:

Race, color, religion, sex, national origin

- Intentional discrimination
- Disparate Impact discrimination

# RACE

## NOT OKAY

- Arrest record

## IS OKAY

- Conviction record

# SEX

## NOT OKAY

- Marital status
- Parental status
- Childcare arrangements
- Family Plans

## IS OKAY

- Other names used
- Any issues with normal work hours

# RELIGION

## NOT OKAY

- Religious affiliation
- Religious views
- Attendance at church

## IS OKAY

- Any issues with normal work hours

# NATIONAL ORIGIN

## NOT OKAY

- Nationality or parentage
- Citizenship
- Nationality or citizenship of spouse

## IS OKAY

- Language fluency if job related

# AGE DISCRIMINATION IN EMPLOYMENT ACT

Prohibits discrimination in hiring or conditions of employment on the basis of age 40 or over.

## NOT OKAY

- Age
- Date of birth
- Date of high school or college graduation

## IS OKAY

- Years of experience in specific duties
- Work history



# AMERICANS WITH DISABILITIES ACT

- Prohibits Discrimination because of a real or perceived disability or a record of disability.
- **Expressly prohibits disability related questions prior to job offer.**
- Disability Related Question - One designed to elicit information about disability.

# DISABILITY

## NOT OKAY

- Nature of disability
- Extent of disability
- Medical history
- Work comp history
- Use of sick days

## IS OKAY

- Ability to perform essential job functions
- Any issues with normal physical job requirements
- Ability to meet attendance requirements

# GENETIC INFORMATION NONDISCRIMINATION ACT

- Prohibits discrimination on the basis of Genetic Information of the applicant or his/her family members "to the 4<sup>th</sup> degree."
- Family medical history is Genetic Information
  - Manifestation of a disease or disorder in applicant's family member.

# UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

- Prohibits the denial of initial employment or reemployment following uniformed service, because of past, present, or future active duty (voluntary or involuntary) in uniformed service.

# IMMIGRATION REFORM AND CONTROL ACT

- Requires employers to prove all employees are legally authorized to work in U.S but, prohibits discrimination on the basis of national origin or citizenship.
- Prohibits singling out individuals by national origin to provide employment verification.
- Prohibits giving preferences to U.S citizens

# OTHER LEGAL ISSUES

## Disparate Impact Discrimination

- Facially neutral questions which have a disparate impact on a protected class.  
i.e.: arrest record, high school diploma, height/weight

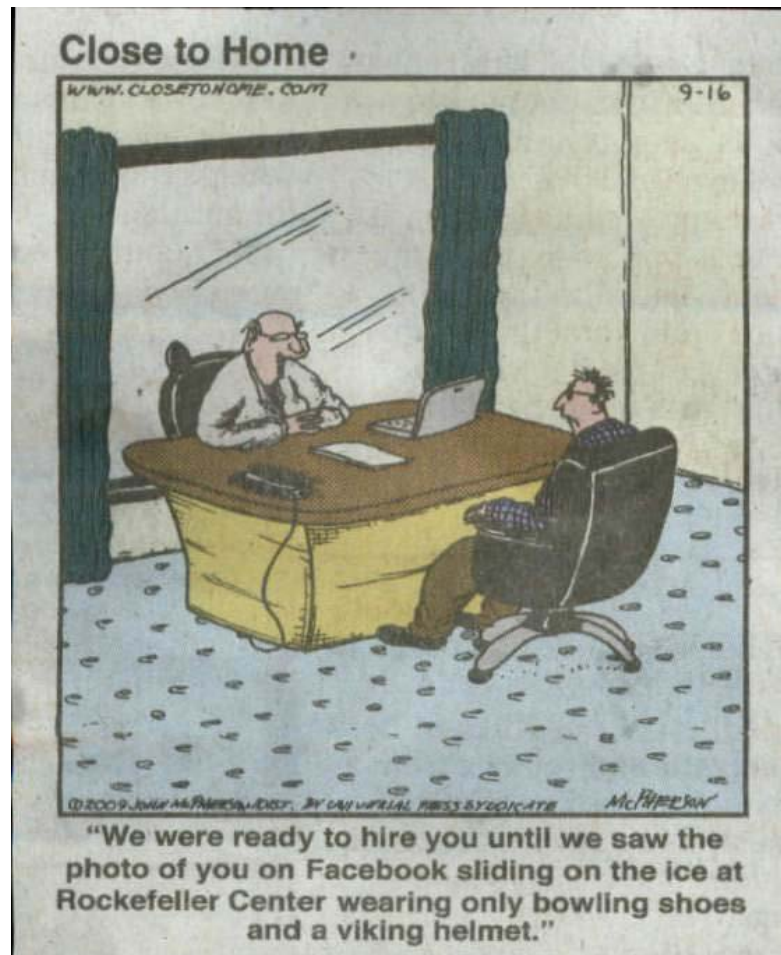
## Associational Discrimination

- Discrimination against a non-protected class member because of their relationship or association with a protected class member.
  - Applicant with a disabled spouse or child
  - Applicant in a bi-racial marriage
  - Applicant married to a foreign person

# PRACTICAL TIPS

- Ask all applicants the same set of questions
- Avoid small-talk and icebreaker questions
- Stick to questions related to the job
  - Experience
  - Achievements in past jobs
  - Proudest moment in past job
  - Most satisfying project
  - Details of specialized experience
- Encourage applicant to ask questions
- Describe job, department etc, and gauge applicants reaction

# SCREENING AND MONITORING APPLICANTS AND EMPLOYEES





# CRIMINAL BACKGROUND CHECKS

SHRM 2010 Survey – 92% of members perform

July 2011 EEOC Hearings

September 2011 EEOC opinion letter

- Pre-employment inquiry does not violate Title VII
- Use of criminal record information may violate Title VII
  - Disparate treatment
  - Disparate impact

“Job related and consistent with business necessity”

# CONVICTION RECORDS

Criminal conduct is recent enough and sufficiently job related to be predictive of performance in the position sought given duties and responsibilities.

- narrow to convictions related to position
- narrow to convictions in last 7 years

# ARREST RECORDS

- Unreliable indicators of guilt
- Innocent until proven guilty
- State records not always complete
- Clerical errors, mistaken identity

If used, limit questions to offenses related to the position and provide applicant the opportunity to dispute.

# FAIR CREDIT REPORTING ACT

Prior to collecting information  
through a third party

1. Provide notice of intent to obtain report
2. Obtain written consent separate from signature at bottom of application
3. Certify to consumer reporting agency that you made disclosure and obtained consent

# FAIR CREDIT REPORTING ACT

After obtaining information  
from a third party

Prior to adverse action, provide applicant with notice of intended action and with background report and notice of FCRA rights.

Upon taking adverse action, provide second notice with reason for decision, explanation of FCRA rights and contact information for reporting agency.

# CREDIT CHECK

EEOC has stepped up enforcement efforts. Several lawsuits challenge companies' use of credit records.

Federal bill pending would restrict use of credit checks except for financial institutions, government agencies, national security clearance.

State laws prohibit or restrict use:

Connecticut, Maryland, Hawaii, Illinois, Georgia, Washington (17 others considering)

# CREDIT CHECK

Generally -

- OK for financial institutions
- OK if required by law
- OK if information substantially related to job, i.e., managers, employees with access to money or assets

# INTERNET AND SOCIAL MEDIA SCREENING

Microsoft 2010 survey – 75% had policies to research applicants online.

70% of recruiters rejected candidates because of information found online:

- provocative photos

- references to drinking or drugs

- bad-mouthing prior employers and colleagues

- information inconsistent with application



# SCREENING AND MONITORING APPLICANTS AND EMPLOYEES

- Screening and monitoring probably lawful if unrestricted access to website or page
- BUT
- Individual's page may include information you cannot ask or consider in hiring or in employment decisions
    - Age, Race, Disability, Religious Affiliation, Family Status, Union Affiliation
  - Solution:
    - Have non-decision-maker perform search and report only non-protected information to decision-maker

# SCREENING AND MONITORING APPLICANTS AND EMPLOYEES

## CAUTION AREAS

- Possibility of Forged Site
- Possibility of Mistaken Identity
  - Address adverse information found with applicant/employee to verify authenticity before making decision
- Implication of FCRA

