THE PITFALLS OF MODERN RECRUITING

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I. INTRODUCTION

With low unemployment and a push to speed up the application process, employers are carefully reviewing and revising their recruitment, application, and hiring processes to streamline them as much as possible. Employers should be cautioned, however, not to overlook the following compliance traps for the unwary.

II. EMPLOYMENT ADVERTISING RESTRICTIONS/REQUIREMENTS

A. Ban the Box Advertising Restrictions, Generally

Three states and seven localities (listed below) have Ban the Box criminal offense prohibitions and restrictions on ads/postings for positions in those jurisdictions. Of those, some allow an ad/posting to include neutral or positive language regarding criminal offenses (e.g., "a criminal offense will not disqualify applicants from employment"), while others prohibit <u>any</u> mention of criminal offenses (including an associated background check, even if positive) at all.

- States:

    1. New Jersey
    2. Washington
    3. Wisconsin

- Localities*:*
    1. *CA: Los Angeles*
    2. *CA: San Francisco*
    3. *IL: Chicago*
    4. *NY: New York City*
    5. *PA: Philadelphia*
    6. *TX: Austin*
    7. *WA: Seattle*

B. Social Media

Hiring has increasingly migrated onto social media platforms. Facebook, for example, allows employers to target specific groups of job-seekers through use of its ad placement tools and filters. The filters permit employers to target who on Facebook can see their ads by age, gender, geography or language. Facebook also provides regular data to employers on how their ads perform among different age groups or by other selected filters.

In December 2017, the Communications Workers of America (CWA) and three named plaintiffs filed a putative class action against Amazon.com Inc., Cox Media Group Inc., Cox Communications Inc. and T-Mobile US, contending that defendants violated the Age Discrimination in Employment Act (ADEA) by using Facebook's ad tools to target younger workers and exclude older workers from viewing their job ads on Facebook. The lawsuit contends that plaintiffs, who are union members in the protected age group (40 or older), could not view the job posting ads on Facebook because of defendants' age-based filtering. Because they could not see the ads, the lawsuit contends they did not know these job opportunities were available and were prevented from applying for them.

In May 2018, the CWA complaint was amended to add the names of additional employers who use Facebook's ad targeting tools and to assert claims under California's fair employment and unfair competition laws. The lawsuit does not currently name Facebook as a defendant. That may be explained in part due to Section 230 of the Communications Decency Act of 1966, which offers immunity to internet platforms that act as passive conduits of third-party content: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230.

Defendants have denied the allegations and contend they hire without regard to age, race, gender or other protected characteristics and use a variety of outlets to advertise their job openings. Defendants have moved to dismiss for lack of standing, lack of personal jurisdiction, improper venue and failure to state a claim. They argue that a disparate impact in hiring claim cannot be asserted under ADEA when the proposed class members were neither employees nor job applicants. Defendants further contend that none of their ads expressed a preference for age, and that the ADEA does not prohibit them from showing jobs to specific age demographics. They argue the ads are no different than companies going to universities to conduct on-campus interviews.

While we watch this high profile case play out, employers should be cautious in placing internet ads that target (or exclude) job-seekers based on their protected characteristics. As demonstrated by the CWA case, many of the same types of discrimination claims and concerns that employers experience in traditional hiring scenarios are now emerging on social media platforms.

III. "SALARY HISTORY" INQUIRIES

For a list of the states and major localities prohibiting "salary history" inquiries (as of April 2019), please see Attachment A.

The intent of the "salary history inquiry" prohibitions is to help prevent potential gender pay discrimination from following an employee from one employer to the next. In order to comply with these salary ban laws, employers should review their employment applications to determine whether they are asking about prior salary information. If so, employers need to determine whether they are seeking applicants for employment in any of these jurisdictions that might prohibit such salary inquiries. If so, employers have two options: (1) include disclaimer language in their employment applications indicating that applicants in specific jurisdictions **do not** have to disclose their prior salary information (this does not work in New York City)[1] or (2) remove the prior salary questions from the employment application.

In determining which approach to utilize, employers may also wish to analyze, as a threshold matter, the motivation for seeking an applicant's prior salary information. If employers are using this information for market analysis to ensure that their pay is consistent with other similar positions in the marketplace or to help determine the compensation that will be paid to applicants, then employers may decide to go with Option 1 (ask but include disclaimers/instructions). However, if employers really are not using the prior salary information and it is just on the application because it always has been there, then employers may decide to go with Option 2 (and simply remove the salary information questions and, thus, be compliant with all of the current "salary inquiry" ban laws).

None of the current salary ban laws prohibit employers from asking applicants about their expected salary/salary expectations.

Title search: The Pitfalls of Modern Recruiting

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