Employer considerations in a hot talent market — don't get burned

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As we address in this column the multiple stages of the employment relationship — and the land mines for employers to evade along the way — we start with the initial process of recruiting and hiring. With a tight labor market, employers must be proactive competing for premium talent. However, traps for the unwary abound in this area.

There are multiple issues practitioners should consider as they advise employers seeking and onboarding new talent.

Hiring remote workers

The COVID-19 pandemic has normalized a "work from home" culture for many employers. But increased rates of remote work, although expanding an employer's pool of potential talent, have given rise to myriad employment issues.

With regard to hiring, employers and their counsel must now be more cognizant of where applicants are based in order to ensure compliance with relevant laws in such jurisdictions. These include potential local "ban-the-box" laws, such as in California (AB 1008) and New York City (NYC Local Law No. 4 (2021)), and prohibitions on seeking information regarding applicants' criminal background.

Also to consider are laws governing what must, or must not, be included in job applications that will be made available to applicants in these jurisdictions. Employers must be mindful of these local variations and adapt their application processes accordingly.

Further, employers could run into trouble by not accounting for the tax reporting implications of hiring remote workers or not complying with all applicable laws surrounding employment compensation, including any local wage and hour requirements.

However, another approach, if possible, may be to avoid hiring remote employees who reside in jurisdictions with especially protective laws.

For example, Colorado's first of its kind wage disclosure law — Part 2 of the Equal Pay for Equal Work Act, C.R.S. § 8-5-101 et seq. — has caused some employers to refuse to consider remote applicants based in that state. Colorado's law requires that job listings for positions that *could* be filled by an employee based in Colorado include wage range information. This means that companies based outside of Colorado, but who are hiring for a remote position that could be performed by a Colorado employee, must comply with this wage disclosure law. Certain employers leery of including salary information in job postings have reportedly excluded Coloradans from applicant pools (a strategy that the Colorado Department of Labor and Employment has deemed noncompliant).

Salary history and salary ranges

Similar to Colorado, several other states and localities have recently passed laws that require disclosing salary range information to applicants for employment either upon the applicant's request, in a job posting, or at another point in the hiring process. Indeed, Connecticut (Conn. Gen. Stat. Ann. § 31-40z), Washington (RCW 49.58.110), California (CA Labor Code § 432.2), and Maryland (Md. Code, Lab. & Empl. § 3-304.2) have such a requirement, and, beginning in mid-May 2022, most New York City employers must provide salary range data in any job posting (Int. No. 1208-B, amending the NYC Human Rights Act).

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Relatedly, Colorado, Connecticut, Washington, California, and Maryland prohibit employers from inquiring about an applicant's salary history during the hiring process, as do Illinois (820 ILCS 112/1, et seq.), New York (NY Labor Law §194-a), and New Jersey (A. 1094 (2019)). In Illinois, employers are also prohibited, with certain exceptions, from relying on salary information even if an applicant voluntarily discloses it.

These salary range disclosure and limitation laws can affect recruiting and retention of quality talent and may require employers to modify their existing hiring practices.

For instance, employers subject to one or more of these salary range disclosure laws will need to determine an appropriate (but enticing) salary range for a position before posting a job opening (both externally to potential candidates and internally for promotions); be prepared to provide that salary range upon the candidate's request; or modify any offer letter to disclose the salary range for the position (not just the salary offered to the candidate). Additionally, employers that are restricted from inquiring about salary history may need to update their applicant tracking systems and guidelines for interviewing candidates to ensure salary history is not requested.

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Moreover, the retention of talent can be impacted by these laws increasing the transparency of wage data: If employers offer higher starting salaries to recruit candidates, existing employees may respond by requesting comparable wage increases (and such adjustments may need to be made regardless to avoid pay compression and pay equity issues within the business).

Signing and referral bonuses

To attract top talent, employers may offer signing bonuses to job candidates (and, to keep their existing talent from being lured elsewhere, referral and retention bonuses to current employees). But the payment of bonuses may implicate wage and hour laws, principally the federal Fair Labor Standards Act (FLSA).

Generally speaking, under the FLSA, certain payments to nonexempt (i.e., overtime-eligible) employees must be factored into the employee's regular rate of pay upon which an overtime premium is calculated. This may, or may not, include bonuses. A *non-discretionary* bonus typically *must* be added to the employee's regular rate of pay to calculate a new, higher hourly rate — which in turn would cause any overtime premium to increase. By contrast, a *discretionary* bonus would not need to be considered for these purposes.

When it comes to new hires, employers may believe certain bonuses they offer are discretionary because they can choose to discontinue offering these bonuses at any time (say, for instance, when talent is more easily retained). However, that premise alone may not make a bonus "discretionary" under the FLSA.

The U.S. Department of Labor has taken the view that a signing bonus may be discretionary, assuming the amount is relatively small and can be viewed like a gift. A referral bonus, on the other hand, could be considered nondiscretionary depending on how it is earned and paid (see FLSA 2020-4 (Opinion Letter) https://bit.ly/3HgUG4B).

The ability to avoid this potential increase in overtime is even more restricted with retention bonuses. If these bonuses are "contingent upon the employee's continuing in employment until" payment is made, 29 CFR § 778.211(c) — as opposed to a one-time payment deemed a "gift" — they are more likely to be considered nondiscretionary, and thus would need to be considered in calculating the regular (and resulting overtime) rate of pay.

Accordingly, employers who utilize bonuses and other incentives to recruit and retain talent and their counsel should carefully review those offerings and consult with counsel to best understand how these may (or may not) affect overtime payment obligations.

COVID-19 vaccination status

Addressing COVID-19 vaccinations has also created novel challenges for employers, including concerning how (if at all) to determine prospective employees' vaccination status or willingness to be vaccinated.

In most jurisdictions, employers are permitted to ask job applicants about their vaccination status. However, in some states, such as Montana (HB 702), employers may not require that individuals respond to such inquiries and also cannot refuse to employ an individual based on his or her vaccination status. Thus, employers will need to consider a patchwork of state and local laws in this area when hiring new employees.

Moreover, even where inquiries about vaccination status are permitted, the question may cause employers to inadvertently uncover information regarding disability or religious affiliation that should not be considered. For example, applicants may respond to a prospective employer's inquiry into vaccination status by divulging they cannot be vaccinated because of a preexisting medical condition that qualifies as a disability under the Americans with Disabilities Act.

Those employers who require vaccinations — assuming they are permitted to do so — may want to consider including in job postings that being vaccinated is a condition of employment, absent a showing of a need for a reasonable accommodation for religious or medical reasons. And the employer should make clear that it is seeking information only on vaccination status, not additional personal and confidential medical information.

Social media checks

Like inquiries about COVID-19 vaccination status, social media checks, which have become more and more common, may inadvertently uncover information that an employer is not permitted to consider in hiring. For instance, by checking applicants' social media, employers may learn about an employee's criminal

background or familial status, which an employer by state law may be prohibited from considering in making hiring decisions.

Additionally, some states, such as California, prohibit employers from taking adverse action against applicants or employees based on lawful, off-duty conduct. *See* California Labor Code section 96(k), (https://bit.ly/35E45We). Typically, such statutes are intended to protect political activity; this of course becomes problematic for employers probing an applicant's social media activity when individuals are increasingly outspoken about politics on their social media pages.

Thus, employers who check applicants' social media should ensure they do not take into account any protected information discovered through such checks when making hiring decisions. And they should be confident they can demonstrate (potentially through counsel if litigated) independent reasons why someone was not hired. Or, perhaps more safely, employers can choose to forgo social media checks entirely.

About the authors

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