

Hiring Compliance Overview

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Berger, both attorneys at Offit Kurman, and today we are talking about regulations related to hiring and publishing, ads for applicants, taking applications in. And in recent times we've seen an increase in state laws that are governing that process including things like what you might have heard of is ban the box laws where you're not allowed to do a criminal background check, or ask about certain background items until a certain point in the interview process or pay transparency laws. There's a lot of different things largely governed by state.

That have been enforced and that people need to be thinking about the hiring process. I think a lot of times employers will think about things once they've hired employees and they've got a handbook in place and do those policies look okay? But you also need to be paying attention [00:01:00] to the hiring process, the application process, those types of things.

So what are some things that people should be keeping in mind when it comes to these hiring practices, Russell?

Russell Berger: Yeah. Well, I think you really hit the nail on the head there. 'cause to start with all the employment laws that we talked about for years on this program about anti-discrimination, anti-harassment need for accommodations.

If they apply to employees, they apply to applicants as well. So, that's just a starting point is, that even though they're not an employee, that the employee protections apply to job applicants as well. So all the things you would think about for employees you have to consider in the application process as well.

And then in addition, you mentioned ban the box, which regulates when you can ask about a criminal history in the process. Different jurisdictions have different rules on that. We've got pay transparency laws that require, posting with reasonable job ranges.

Again, that's a state or jurisdiction specific issue. Certain jurisdictions have rules that say you can't ask about what someone is [00:02:00] currently making and prohibit certain types of questions like that. So, I mean, you really have to have, a basic understanding of all these things. And I think most helpfully you develop a process and a protocol and not necessarily a script for an interview, 'cause you wanna probably make it a little more, personable and interactive than that. But at least in an outline, a framework and, what to stay away from throughout the process.

Sarah Sawyer: Yeah, I think for as is the case with a lot of things, there's exceptions to some of this as well, depending on what it is.

And it's gonna be different for each state. So, for instance, when we mentioned Ban the Box which deals with background checks, well, there might be, rules around when the background check can be done and how you use the background check and what you can deny employment for. But there might be exceptions to that.

Obviously in highly regulated industries like financial. Or, maybe childcare or safety regulated areas or, varying types of areas. People like that are hiring police officers, for instance. Right. Criminal background checks are really relevant to that. There are exceptions to some of these things [00:03:00] and there is nuance, and I think that's one of the challenging things about this patchwork of regulations is that they're state based and sometimes they're even local based.

So some states might not have a statewide law, but there'll be a local jurisdiction that has particular rules on these topics, and then there's nuance and exceptions within those often as well that might accommodate for a certain type of business or a certain type of situation. And those can, even when you drill down even further sometimes that can even be position specific versus industry specific as well.

Definitely good to be prepared and have a good understanding of what you should do when, 'cause there's good reasons sometimes to take a little bit of a different course of action based on the facts. And so it's definitely a nuanced area.

Russell Berger: Yeah. Right. Well then let's say you go through that process and you do a background check or a credit check, what have you, and you do it in a lawful way, and you find information that would disqualify the candidate. That implicates another law, the Fair Credit and Reporting Act which is a federal law.

So it applies to [00:04:00] anywhere in the country. If you're in the process of hiring someone, and oftentimes, we say do the background check after a conditional offer goes out and make sure your offer letter that is clear, that is conditioned on successful completion of a background check.

But, if you hire third party to do a background check, and you would get a hit and you don't wanna go forward with the person. Then there's a two step process where you give preliminary notice of a potential adverse action and the potential employee has an opportunity to correct the record or respond or challenge or object or what have you.

And then you'd have a second letter you'd send after that process completes, assuming it hasn't changed the answer. Again, it's not that you have to have that memorized. What you do need to memorize or know is, if I do a background check and I'm not gonna proceed with a candidate because of what I learned in the background check, there is a process that has to be followed.

There are steps that you have to follow and another one of those kind of technical compliance areas.

Sarah Sawyer: Yeah, and definitely something to pay close attention to. Well thanks Russell, and we'll see you next time.

Russell Berger: Thanks, Sarah.

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