When Legal Issues Make It Even Harder to Hire and Retain Talent

Script/Summary

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1. **Introduction**—Joanna

With job openings outpacing the number of unemployed people, economists expect employment growth to continue slowing through 2019. This creates a situation where an already stressed labor market will be pushed to the breaking point. There simply aren't enough workers to fill every open position. Roughly 40% of employers report struggling to fill those open positions, according to recruitment firm ManpowerGroup.

As staffing firms, we see this impact first hand—both in the form of increased requisitions (a good thing) and in the number of unfilled orders. Never have we needed to be able to employ every candidate that walks through our doors.

At the same time, clients (who are dying for workers) are placing ever more screening requirements, exacerbating the issue further and potentially creating new risks as their background check demands may run afoul of new EEO and state and local background rules, or the ominous requirements of the FCRA.

So, you have this pressure to fill a job, demands by your client to do background checks, and legitimate concerns that if you don't do a background check or you don't do it thoroughly and something goes wrong, then you are getting sued.

And there is nothing worse than going through the effort of finding somebody, completing the background check correctly, and placing them on assignment, only to have them leave and go to a competitor. Can you craft a non-compete to protect your interests? Or will the trend in finding these agreements unenforceable continue?

<u>Topics covered:</u>

- Background Checks, Ban the Box, Fair Credit Reporting Act
- Employer liability for the acts of temporary associates
- Non-competes and restrictions on employee mobility
- Practical tips to address all of the above

2. **Ban the Box**—Russ

As of December 2018, 34 states and more than 150 cities and counties have adopted "ban the box" so that employers consider a job candidate's qualifications first without the stigma of a conviction or arrest record. Eleven states—California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode

Island, Vermont, and Washington—have also mandated the removal of conviction history questions from job applications for private employers.

Originally, ban-the-box laws were concerned with the initial application process, but now many of these laws have morphed into Fair Chance laws that also impose processes for how criminal information is obtained and utilized. Ban-the-box laws often are no longer limited to just the application process.

Practical Tips:

- Specific state, county, city, and municipal ban-the-box laws should be reviewed prior to establishing policy
- Determine if ban the box applies to Government employers, Government contractors, private employers
- For businesses with locations in multiple jurisdictions, consider one system-wide policy as opposed to individual state policies

3. Background Checks/Criminal History Information—Russ

Practical Tips:

- Obtain after conditional job offer
- Consider Fair Credit Reporting Act and Nuances State Fair Credit Reporting Acts
- FCRA requirements
    - Obtain disclosure and authorization PRIOR to obtaining criminal conviction report
    - Hyper technical requirements of disclosure and authorization
    - Comply with pre-adverse and adverse action letter process and requirements
    - State mini FCRA laws may impose additional requirements regarding content of forms
- Comply with EEOC guidance on considering criminal conviction information
    - No blanket exclusions (aka “no conviction” policy)
    - Targeted screening criteria (job related and consistent with business necessity)
    - Conduct individualized assessment

4. Salary History Bans—Russ

The salary history ban makes it illegal to ask about a candidate’s current or past salary during a job interview. There are 11 state-wide salary history bans and 10 local salary history bans currently or soon to be in effect. The rationale for these laws stems from the equal pay issue and the premise that pay for the job should be based on the value of the job to the organization—not the pay an applicant might be willing to accept.

Salary history bans are designed to address gender pay inequality. Although it has long been illegal for employers to pay men and women different wages for the same work, a significant pay gap still exists. According to a report from the Bureau of Labor Statistics, women earned 82% of what men earned in 2016. For minority women, the pay gap is generally even more pronounced.

Practical Tips:

- Specific state, county, city, and municipal salary inquiry bans should be reviewed prior to establishing policy
- For businesses with locations in multiple jurisdictions, consider one system-wide policy as opposed to individual state policies
- Salary inquiry bans prohibit employers from asking applicants about their current or past salaries or benefits
- Generally, also prohibit employers from seeking this information through an agent or from sources other than the applicant, such as the applicant's former employers
- In some states, employers can seek salary history information only after making a conditional offer of employment with a specified salary
- Can still ask applicants about their salary requirements or expectations for the job
- If applicant offers up salary information voluntarily without being asked, the employer can consider that information in setting pay
- Employers in all states are still prohibited from paying men and women different wages for the same work under the federal Equal Pay Act
- Must be legitimate business reason for the disparity in wage (seniority, experience, or the quality or quantity of the employee's work)

5. Staffing Firm Liability for the Acts of Temporary Employees—Joanna

Staffing firms are caught between a rock and a hard place. There is significant tension between client requirements; federal, state, and local background check requirements; and the risk of getting sued for the negligent or intentional bad acts of the temporary employee. There are two instances in which a staffing firm can be held responsible for the acts of the temporary employee: respondeat superior or negligent hiring/retention.

Respondeat Superior

- Employer is legally responsible for the actions of its agents who are acting within the course and scope of their employment
- Staffing firm will generally be liable for a temporary employee's carelessness if the incident occurred while the employee was on the staffing firm's behalf when the incident took place
- But if the employee acted independently or purely out of personal motives, the staffing firm might not be liable

Negligent Hiring/Retention

- Claims can be made by an injured party against an employer based on the theory that the employer knew or should have known about the employee's background which, if known, indicates a dangerous or untrustworthy character.

- In analyzing these claims, courts generally assess whether the employer exercised reasonable care in choosing or retaining an employee for the duties to be performed.

Examples:

- Let's assume you assign a temporary employee to drive a forklift for a client and he accidentally drives it into one of the client's employees, causing damages.
- You will probably be legally responsible because the accident occurred within the course and scope of the assignment.
- If, however, the shift is over and the temporary employee decides to take the forklift on a joyride and deliberately hits the client's employee, then you would not be liable because the temporary employee committed an intentional criminal act.
- Criminal intentional acts are outside the course and scope of employment and are clearly against an employer's interest, so you would probably not be liable under respondeat superior.
- Now let's assume that you knew that the temporary employee had a prior conviction for joyriding.
- His license was suspended, but in a rush to meet your client's needs you sent him to perform the job anyway.
- He takes the forklift for a joyride and deliberately hits the client's employee, causing injuries.
- In that instance, you could be liable under the theory of negligent hiring or retention because you knew or should have known about his propensity for joyriding, yet you sent him anyway.

Summary of Key Differences in Theories:

- Under respondeat superior, you can be liable **if the employee** acts carelessly.
- Under negligent hiring or retention, you can be liable if **YOU** acted carelessly.
- That is, if you knew or should have known that an applicant or employee was unfit for the job, yet you did nothing about it.

Examples Where Companies Have Been Held Liable:

- A pizza company hired a delivery driver without looking into his criminal past—which included a sexual assault conviction and an arrest for stalking a woman he met while delivering pizza for another company. After he raped a customer, the pizza franchise was liable to his victim for negligent hiring.
- A car rental company hired a man who later raped a co-worker. Had the company verified his resume claims, it would have discovered that he was in prison for robbery during the years he claimed to be in high school and college. The company was liable to the co-worker.
- A furniture company hired a delivery man without requiring him to fill out an application or performing a background check. The employee assaulted a female customer in her home with a knife. The company was liable to the customer for negligent hiring.

Practical Tips:

- **Establish a background check policy**
  - Develop a comprehensive background screening policy that explicitly states the types of screening that will be performed for specific categories of job.
  - Consider developing a matrix which can be quickly referenced.
  - Specifically identify a category of assignments that require a background check or more, regardless of what the client is asking for.
  - This should include jobs where
    - a background check is required by law
    - there is high contact with the public
    - the employee is going into a residence, school, or medical facility
    - the work will put the temporary employee in contact with vulnerable people such as children, the elderly, or people with disabilities
    - there is access to weapons
  - Some of the roles most known to be at risk to do harm include real estate agents, rental apartment personnel, condominium personnel, delivery persons, service and maintenance persons, nursing and convalescent home workers, home health care aides, and utility personnel, as well as positions that interact with children or other vulnerable populations.

- **Assess the risk of the job and the assignment**
  - Ensure a process is in place to assess the job assignment against your policy to determine whether a background check is required, regardless of whether the client is requesting one.

- **Conduct a thorough background check**
  - The higher the risk, the deeper the background check should go.
  - For high-risk positions, background check sources should include a national search, and a physical county records search for each county the employee resided in for the last seven years.
  - Don't rely on online county searches; courts are not required to keep online records up to date and they may not be complete or accurate.

- **Make sure you are working with a reputable background check vendor**
  - The cheaper and faster the service, the more likely you are to miss something. This can have huge consequences.

- **Remember, hindsight is 20/20**
  - Your actions, or failure to act, will most likely be looked at through the rear-view mirror, in front of a jury, after something bad has happened. What will you be able to show you did? Does it pass muster from a "man on the street" perspective?
  - Employers have about a 75% chance of losing on these cases. The courts will look beyond what you know and hold you accountable for what you should have known.

- **Respond to issues or concerns promptly**
    - Under the theory of negligent retention, you can be responsible for keeping a worker on your payroll after you learn (or should have been aware) that the worker poses a potential danger. If an employee has made violent threats against customers, brings a weapon to work, or racks up a few moving violations, you must take immediate action.

- **Re-verify**
    - If there has been a significant passage of time since you conducted a background check, and the worker is still in a safety sensitive role, consider conducting another background check. Follow the proper procedures.

6. Non-Competes and Non-Solicits—Whitney

Both legislatures and courts are increasingly hostile to non-competes, but a well-crafted and state-specific agreement can still prevent unfair competition and provide important protections for your customer relationships and confidential or sensitive information regarding customers, operations, business practices, marketing plans, etc. The following are a few practical tips to keep in mind to effectively and legally use non-compete and non-solicit agreements.

Practical Tips:

- **One size does not fit all**
    - Specific state laws are critical to crafting an enforceable non-compete agreement. This is one area where consulting with counsel is likely critical to ensuring an enforceable agreement.
    - Do your diligence with respect to the state law that will apply to the non-compete *before you have an employee sign a non-compete*. Some states have requirements for providing notice of the non-compete agreement before the employee begins work or prohibitions against non-competes for lower wage or non-exempt workers.
    - Ensure you have proper consideration under the applicable law. While most states consider an offer of employment sufficient consideration for a non-compete for a newly hired employee, there are nuances in some states and many states do not consider continued employment sufficient consideration for existing employees.
    - Non-solicits are generally more enforceable and acceptable than non-competes, but are not without concern. Look closely at non-solicit provisions and ensure they are reasonable and targeted.
    - In California, courts have recently rejected the reasonableness approach in non-solicits and employers should review their agreements and reconsider use of employee non-solicitation provisions.
    - Include a choice-of-law provision and a provision allowing the employer to assign the agreement.

- **Reasonableness is still the key criteria**
    - While state laws are increasingly dictating the terms of enforceable agreements, generally the rule of reasonableness still applies to determine the enforceability of non-competes and non-solicits. This is with respect to the activities restricted, geographic boundaries for the restrictions, and how long the restriction will last.
    - The general rule is that the restricted activities, duration, and territory should all be reasonably necessary to protect the former employer's legitimate business interests.
    - Some state laws may dictate the acceptable duration of a non-compete or at least provide a "presumptively reasonable" duration.

- **Use exit interviews, pre-employment inquiries, and acknowledgments**
    - Exit interviews are an important tool to ensure departing employees remember and fully understand their post-employment obligations, and can hopefully help eliminate the need for legal action post-employment.
    - Use exit interviews to ensure the departing employee has returned all property and information; gather valuable information regarding the departing employee's future employment; and assess risk of issues with post-employment restrictions.
    - Hiring employers should inquire as to any non-compete or other post-employment restrictions that a candidate for employment may be bound by and expressly inform the candidate of its expectation that the candidate will not violate any such restriction/agreement.
    - Have new employees sign an acknowledgment that they have not brought and will not use any of the former employer's property or confidential information in his/her new employment.

- **State and federal lawmakers are focused on protecting "employee mobility"**
    - There has been significant activity at the state level to limit the use and breadth of non-competes and it is not limited to the traditionally active states such as California, New York, and Massachusetts. Idaho, Utah, Colorado, New Jersey, Washington, and Vermont lawmakers were also active in the non-compete space in 2018.
    - In addition to state laws, watch for developments in federal law. Legislation has been proposed from both parties to prohibit or limit the use of non-competes.
    - States' attorneys general have taken an interest in protecting employee mobility and are actively investigating and challenging practices that have been generally accepted for years.

- **Review your standard agreements periodically to ensure continued enforceability**

- In light of the rapidly changing landscape of the law in this area, drafting a non-compete is not a once and done. Include review of your agreements in your annual review checklist. State laws may change, requiring you to adjust new and/or existing agreements. Changes in your business—including business lines, essential employees, key customers, information, and techniques—may also trigger a need to adjust the agreement to ensure sufficient protection and/or reasonableness.

7. **General Tips to Enforce**—Panel

- Russ: Arbitration agreements and class action waivers
- Whitney: Tracking mechanisms
- Joanna: Compliance programs