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Special Report for HR Professionals

October 18, 2013
Number 557

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HOW LITIGATION-PROOF IS YOUR HIRING PROCESS?

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While OFCCP audits related to compensation are grabbing a lot of the headlines, when it comes to actual dollar amounts including fines and make-whole relief that employers are forced to pay, by far the greater risk is related to hiring discrimination. There are a number of reasons for this.

One reason is that it is much easier to identify instances where there are differences in hiring rates between groups of employees. The other reason is that the process for determining whether the differences in hiring are the result of bias has been much more clearly defined through years of legislation and the establishment of court precedents.

Whereas explanations for compensation differences can require a combination of statistical analysis, policy analysis and a lot of interpretation, adverse impact in hiring is much more clear-cut.

Essentially the question comes down to 1) Is there a statistically significant difference in hiring rates? 2) If so, can it be shown that the hiring procedure is related to the job, and consistent with business necessity? The general questions that any court will ask when evaluating your hiring process are presented below as well as what you should be able to do to answer those questions in order to defend your organization's hiring decisions.

Question 1 - Does any step in your hiring process result in adverse impact by gender or minority status?

It is important to note that your "bottom line" hiring rates do not erase discrimination that occurs at any point along your process. It is essential that you evaluate statistically significant differences in recruitment response rates, ratios of those selected for interviews/testing, and who actually gets hired. We can assure you that the OFCCP will look at this if you are audited.

Question 2 - If adverse impact exists, can you demonstrate that your selection procedure is valid?

Adverse Impact, on its own, is not a violation of the law. It may be that two groups just happen to have different abilities (e.g., gender differences in physical abilities may be one example) but this is actually quite rare.

Question 3 - If your selection procedure is valid, did you consider other selection procedures that were essentially as valid but which could have resulted in lower adverse impact?

While a valid process is a necessary condition to legal defensibility, it is not a sufficient condition. Often, two different selection processes share similar levels of validity but one typically exhibits more adverse impact than the other. In such cases, an employer is required to *consider* the alternative with the least

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EVEN A 15-MINUTE TASK MAY BE AN "ESSENTIAL JOB FUNCTION" UNDER THE ADA

After injuring her wrist at work, a housekeeper working for Franciscan Communities, Inc., sought a reasonable accommodation. This request set in motion a chain of events which, on the surface, may seem surprising given that the *Americans with Disabilities Act (ADA)* is the law of the land.

The employee injured her wrist at work and underwent surgery, after which, she was off work for three months. When she returned to work, she was placed on light duty as her recovery continued.

Eventually, she was instructed by her doctor that she should no longer lift any weight heavier than 5 pounds. This posed a significant problem because part of the employee's job was to push an 80 pound cart to and from the laundry room each day. Typically, this task required 15 minutes of the employee's time.

Upon learning of the employee's limitations, the employer determined that she was no longer fit for duty. Because pushing the cart was a requirement for everyone else who performed her job, it was deemed to be an "essential job function." The employer placed her on a 45-day paid leave with the instruction that she needed to look for other employment as she was to be terminated.

The employee contended that, given the brief nature of the task and the unwillingness of the employer to provide a reasonable accommodation, the employer was guilty of discrimination under the *ADA*.

In court, the employer argued that transporting the cart was necessary for housekeepers to perform their jobs as their daily responsibilities included replacing soiled linens with the fresh linens from the cart. Moreover, this task was specifically allocated to the housekeeper position and the job description included pushing and pulling in excess of 50 pounds.

The employee argued that the duty could be assigned to someone else. Despite declarations from three other employees that the carts were heavy and that it was not uncommon for male employees to assist them, the court pointed out that the coworkers did not assert that the responsibility to move the carts actually belonged to the male coworkers.

As a result of this and other factors, the court rejected the claims of the employee that the duty was not an essential job duty--in spite of the brief amount of time spent performing the task. Further, the court stated that the relatively short duration of the task did not affect its determination that it was essential. Because all similar employees were responsible for transporting their own cart to the unit where they were assigned, having another employee perform the task would substantially increase, in the aggregate, the responsibility of the employee so assigned.

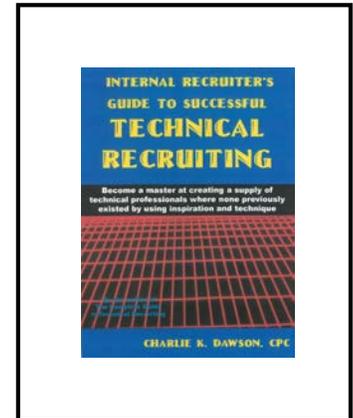
This case can be considered a "win" for employers because it demonstrates that they have a good deal of freedom in determining which duties are essential--given that they have a defensible rationale. However, it is just as important to remember the value of engaging in an open and rational dialogue in such cases as it may permit the avoidance of such cases in the first place.

Source: *Vraniskoska v. Franciscan Communities, inc.*, 2:11-CV-308 2013 WL 4647224 (N.D. Ind.)

For a copy of the case go to <http://docs.justia.com/cases/federal/district-courts/indiana/inndce/2011cv00308/66653/53/0.pdf?1377856906>

Internal Recruiter's Guide to Successful Technical Recruiting

If you are an inside recruiter or technical placement expert who specializes in computer technology jobs, this is a reference you won't want to miss. It is something you will use daily to plan your business activities and guide you to stronger relationships and higher earnings.



<http://www.management-advantage.com/products/recruit2.htm>

POTPOURRI

■ What makes an employee happy

It is well known that many factors impact the happiness of employees. Furthermore it is generally well accepted that employees who feel happy at work tend to remain with their employers. The benefits of retention are hard to ever estimate in terms of recruiting, hiring, training, and productivity related costs. We found a series of useful graphics that can help you evaluate the happiness of your employees.

*Source: <http://www.yast.com/productivity/employee-happy-infographic/>

■ Abercrombie & Fitch agree to alter controversial "Look Policy"

The retailer has agreed to change its "Look Policy" after being on the receiving end of two high-profile lawsuits filed by Muslim women.

*Source: <http://www.hrmorning.com/abercrombie-fitch-look-policy/>

■ Committee requests information on regulatory changes affecting federal contractors

House Education and Workforce Committee Chairman John Kline (R-MN) Workforce Protections Committee Chairman Tim Walberg (R-MI) have expressed the belief that the DOJ has failed to establish its statutory authority under VEVRAA and Section 503 for establishing numerical "benchmarks" or "utilization goals" for protected veterans or individuals with disabilities. They are seeking a formal response from the DOL.

*Source: <http://edworkforce.house.gov/news/documentsingle.aspx?documentID=350478>

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HOW LITIGATION-PROOF IS YOUR HIRING PROCESS? *(Continued from page 1)*

amount of adverse impact. Note that this does not mean that you are *required* to use the assessment process (selection step) with the least adverse impact.

Why not? It is because adverse impact is not the only consideration. Other factors that impact the feasibility of the alternatives must be considered. These include factors such as: How many candidates do you anticipate having to assess? How much time is available? What resources are available? Are there collective bargaining agreements that stipulate specific selection methods.

All of these taken together force an employer to take into account other factors besides the level of validity demonstrated by a particular assessment procedure or the amount of adverse impact often caused by a specific assessment procedure. For this reason, there is no requirement to always use the procedure with the least adverse impact.

What is required is that an employer consider the alternative procedures and, given the fiscal and logistical constraints, select the most valid approach with the least adverse impact. This requires the employer to carefully evaluate the available alternatives.

If an employer is able to answer these questions as described above, meaning they have evaluated adverse impact, validated their assessment procedures, and selected from among alternative selection procedures the one that is most valid and exhibits the least adverse impact given the documentable constraints placed upon them, it is highly likely the organization's hiring procedures can be defended successfully.

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