

LEGAL IMPLICATIONS

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White Papers



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The Legal Implications of Recruitment and Selection Technologies

INTERNET AND TELEPHONE SCREENING

Many savvy employers are implementing technologies that are designed to improve and streamline their recruitment and selection efforts. These technologies include Internet-based and telephone Interactive Voice Response ("IVR") screening processes. Specifically, prior to having a job applicant visit an employer's place of business, employers are directing applicants to the Web or phone to complete job applications, answer questions regarding minimum qualifications and take assessments. Such processes can be quick, convenient and cost-effective because they are designed to allow individuals to:

- Apply for employment 24-7.
- Minimize paperwork.
- Expedite time to hire.
- Increase the size of applicant pools.
- Pre-qualify candidates to minimize time wasted on unqualified candidates.

Along with these commonly recognized improvements, however, recruitment and selection technologies raise some specific legal issues.

ADA – PROVIDING REASONABLE ACCOMMODATION

Just like any other piece of the employment process, new technologies raise the issue of reasonable accommodation. Employers must realize that it is ill advised to mandate that all applicants apply for employment

via the employer's Web and/or IVR hiring systems. Obviously various disabilities (e.g., visual impairments) may preclude some applicants from effectively using Web-based processes. Other disabilities (e.g., hearing impairments) may significantly hamper an applicant's ability to apply via an IVR process. And certain disabilities such as motor or visual impairments may preclude the legitimate use of either technology. As a result, employers must be flexible in their approach to hiring and not mandate that applicants exclusively seek employment via their technology platforms. It is prudent for employers to describe their hiring process and the associated technologies to applicants and invite them to seek reasonable accommodation. As a part of this approach, employers should be willing to provide non-technology-based accommodations including, but not limited to, paper-based application/assessment materials and readers for such materials.

MAXIMIZING ACCESS, DIVERSITY AND FAIRNESS

While the Internet is definitely the most commonly used technology in the modern employment process, employers need to realize that driving all applicants to the Web has the potential to raise the issue of "disparate impact." The doctrine of disparate impact discrimination comes into play when a facially neutral employment procedure (here the requirement to apply via the Web) has a substantially negative impact on individuals because of their



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subgroup membership. In the case of pushing all applicants to the Web, there is strong evidence to suggest that individuals will be negatively impacted because of their race and age—the latter now being particularly salient since the U.S. Supreme Court recently held that disparate impact claims are cognizable under the Age Discrimination in Employment Act (See *Smith et al. v. City of Jackson*, 544 U.S. 228 (2005)).

While the digital divide has certainly narrowed over the last few years due to a variety of trends (e.g., computer costs, computer access available in libraries, Kinko's), large-scale research in the employment domain shows that certain subgroups still do not have equal access to the Web. For instance, when given the opportunity to choose between a Web- or IVR-based system to apply for employment, research shows the following order in subgroup usage of the Web:

1. Whites
2. Asians
3. Hispanics
4. Native Americans
5. African Americans

While Asians and Whites exhibited almost equal use of the Web-hiring process, the other three subgroups' Web usage was substantially lower, while their use of the telephone hiring process was approximately double that of Whites or Asians. As for age, individuals who were under 40 were much more likely to apply for employment

via the Web than their counterparts who were 40 or over.

In the research described above, the two technologies (Internet and IVR) worked together to enhance the diversity of the applicant pool and minimize the likelihood of the application process having a disparate impact on the basis of race and age. It is important to note that merely providing a paper and pencil alternative to the Web is not a viable means of addressing this issue. Rather than being able to make a phone call or access the Internet to apply for employment 24-7, subgroups that tend to be non-Web users would be required to travel to the employer's place of business to apply for employment. Given the time and other costs (e.g., child care, time of work, transportation) associated with applying for employment in person, such a process will do little to increase the pool of applicants from the relevant subgroups. Additionally, candidates and their retained lawyers will potentially view such a process as intentionally discriminatory—the employer intentionally placed a more significant burden on the plaintiff's subgroup to apply for employment. Note, unlike disparate impact suits where the harmed party may simply be compensated for actual damages, punitive damages are available to parties harmed by intentional discrimination. Bottom line, the most effective approach to ensure diversity in the recruitment process, and avoid claims of disparate impact and disparate treatment, involves the use of both IVR and Web technologies.



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CONCLUSION

In sum, the use of Internet and IVR technologies in the employment process is extremely beneficial for employers and job applicants. Applicants can apply for jobs any time they want from almost anywhere. Employers typically experience significant process savings, while preventing the loss of applicants to competing employers due to delays in their recruiting process. However, it is important for employers to be aware of the related legal issues—some common to all employment processes and others that are idiosyncratic to the use of technology. Through adequate recognition and addressing of these issues, employers can decrease the likelihood of expensive litigation, and their exposure to significant liability and negative public relations, while increasing the quality of their workforce.