National Association of Legal Search Consultants

Featured in the National Association of Legal Search Consultants Newsletter Summer/Fall 2019

It's Not Just the Employer Who Can Be Sued: You Can Too!

by Mark J. Neuberger, Esq.

Anyone who practices in the professional recruitment industry needs to be aware of the expanding trend of disgruntled employees and applicants suing others besides their employer when things do not work out the way they want. In the never-ending search for a deeper pocket, plaintiffs and their lawyers are increasingly suing third parties involved the employment process. While the practice may be new and expanding, the underlying law really is not.

The basis for recruiter liability for employment discrimination is as old as Title VII of the Federal Civil Rights Act passed in 1964. That law, which prohibits discrimination against a broad range of protected categories, specifically provides "it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on such basis…"

Title VII of the Civil Rights Act also provides that it shall be an unlawful employment practice for "an… Employment Agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer…. or referral for employment by such an employment agency… indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin…" 42 U.S. Code §2000e–2. Very simply, the authors of Title VII didn't want employers to be able to use others, like recruiters, to do their dirty work for them. In addition to Title VII, the Americans With Disabilities Act and Age Discrimination in Employment Act, not to mention the ever-growing body of state and local laws, can all be applied to recruiters who engage in discriminatory practices.

Other times, as is the case in at least 11 different states, the anti-discrimination laws have been applied to anyone is who is found to "aid or abet" discriminatory conduct. It is easy for a recruiter to get sucked into liability you might have thought could only attach to an employer. Potential third-party liability for hiring discrimination is not just limited to recruiters but also may include temporary staffing agencies, background screeners, and virtually any other vendors involved in the recruitment and hiring process.

Direct discrimination is easy to avoid by "Just not doing it!" i.e. don't engage in what they call disparate treatment. However, (under the well-recognized alternative basis to find discrimination known as disparate impact,) a neutral hiring process or procedure which tends to select out minorities or others in a legally protected category at a higher rate can also be illegal discrimination. The classic example is that, before the passage of Title VII, many police and fire departments had a specific height requirement. While that standard was applied equally to every candidate, if you set it high enough you would likely screen out women, Asians, and Hispanics. If the height standard was a legitimate requirement to become successful first responder then the practice could stand. As was demonstrated through years of litigation, governments were unable to establish that most such height requirements had no relationship to insuring successful job performance as a police officer or firefighter.

In addition to recruiter liability for discrimination, recruiters can be held liable under traditional tort theories. One example is civil fraud. The way such a claim would arise is that a recruiter knowingly made a material misrepresentation of fact which induced a candidate to accept a job. However, had the candidate known the truth, they never would have accepted that job. A simple example: recruiter tells candidate the law firm I am referring to you has family-centric and reasonable billable hour requirements, knowing full well all attorneys must bill at least 2,000 hours.

What should you be doing to protect yourself or your business?

- Know your client employers and know them well. Don't get in bed with an employer who you know or should have known is likely to screen out candidates in a particular protected category.

- Enter into well-drafted and well-thought-out contracts with your clients which set forth the responsibilities and obligations of each party and clearly set forth the obligation not to discriminate. In 2019, conducting any type of business on a handshake is a huge risk.

- Don't oversell! Promise the moon and the stars to your candidate and one of them just may fall out of the sky and hit you on your head.

- Check your insurance coverage. Does your general liability policy cover employment practices? Most GL policies exclude such coverage unless you purchase a specific rider. Don't have GL insurance? Maybe it's time to call your broker.

- Do a statistical analysis of your own recruitment and referrals. (Of course, if you are like me and went to law school because you can't do math, you will hire a consultant with appropriate expertise.) What you need to know is whether you are unwittingly screening out candidates of a particular protected category or, in other words, engaging in disparate impact discrimination. Similarly, is your client rejecting your referrals of a particular protected category? If the answer is "yes," seek reasons and take remedial actions.

Like everything in the world today, being a recruiter is complicated due to seemingly conflicting legal and business obligations.

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