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EXPERT FORUM

MANAGING RISK WHEN HIRING NEW EMPLOYEES



PANEL EXPERTS



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RC: Could you briefly discuss some of the key challenges and risks associated with hiring new employees? What mistakes do firms commonly make during the process?

Oldham: The primary challenges and risks are not verifying backgrounds, credentials, experience and education. Essentially, you don't know what you don't know. So, performing a background investigation is necessary.

Hale: There are at least three areas where we repeatedly see problems arise. First, an employer should know those it hires. An employee with performance problems is often the result of a hiring process that was incomplete, insufficiently rigorous or both. An employer has a number of tools at its disposal. It can direct its interviewers to focus clearly on how well an applicant's established skill set meets its needs. It can conduct reference checks that also focus on the skill sets applicable to the position. It can use social media, as long as it does so without pretexting or misusing information from social media sources. It can get further background information through a background check. There is considerable scepticism about the utility of each of these tools in isolation, but by using all of them in a focused and rigorous manner, an employer can be in a better position to identify the best

candidates. Second, employers should make sure that interviewers know some basic employment discrimination rules that apply to hiring. Legal claims arising from hiring decisions most often are based on statements made in interviews. The most challenging aspect of the law that affects interviewing concerns disability-related questions. With very limited exceptions, interviewers should not ask about medical problems or workers' compensation absences. An employer may obtain a medical examination after making a job offer that is conditioned on the examination, but it generally needs to avoid making pre-offer inquiries relating to possible disabilities. In addition, although employers have become more sensitised over the years to avoiding inquiries about pregnancy and other family considerations, we still learn of missteps by employers in asking questions that can tend to screen out candidates on the basis of pregnancy specifically or gender in general. Moreover, with an increase in the number of older applicants seeking jobs, employers need to avoid stereotypical assumptions about energy level and the anticipated commitment to jobs, and interviewers certainly need to avoid asking questions that suggest that they are making such assumptions. Third, employers too often do not learn of or sufficiently explore possible non-competition and non-solicitation issues during the hiring process. Some employers believe that obligations under non-competition and non-solicitation agreements can be easily avoided.

Sometimes those agreements are overreaching and unenforceable, but often they are enforceable. Employers should be careful before making commitments to new hires to indemnify them against liability and attorneys' fees in connection with non-competition and non-solicitation agreements.

Berkowitz: Perhaps the biggest mistake that companies make in hiring new employees is misclassifying them either as independent contractors or consultants, or as exempt from the federal and state laws mandating payment of overtime. Employers may seek to avoid providing benefits to new hires and therefore either accept an invitation to retain them as consultants, or impose this status on them. This is a very risky practice because it can lead to significant liability for unpaid overtime and back taxes. Also, improperly classifying individuals as 'exempt' from overtime laws can lead to the same liability. The law in the United States prohibits discrimination based on many factors, including age, gender, religion, race, colour, pregnancy and disability. It is almost always illegal to base a hiring or firing decision based on an individual's age, no matter how old the individual may be. This is often a difficult reality for foreign companies doing business in the United States to understand. Mandatory

retirement on the basis of age is almost always illegal. The misuse of social media in checking candidates' backgrounds also presents great risk of claims of unlawful discrimination.

Wray: Employers in the United States sometimes complain that they are pulled in opposite directions with respect to the legalities of the hiring process. They face a claim of 'negligent hiring' if they fail

"Today employers are increasingly using social media to recruit and scrutinise employee candidates, but these sites could expose employers to more information than they are legally allowed."

*Risa Salins,
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to properly vet an applicant who is hired and subsequently causes harm to other employees or members of the public, and it is shown that a prudent employer would have discovered something in the applicant's background which would have kept the employer from hiring the applicant. On the other hand, state, federal and local governments have enacted laws that limit both the process employers

can use to gather information and the use to which information which is gathered may be utilised in the hiring process. For example, under the Americans with Disabilities Act (ADA), employers may not request medical information from an applicant until they have first made an offer of employment conditioned only on the outcome of a medical evaluation. If the applicant is then rejected for any medically related reason, including alcoholism or a history of illegal drug use, the employer must be in a position to show that the medical condition would have kept the applicant from properly performing the job applied for, even with reasonable accommodation provided by the employer.

Salins: It is a challenge to properly vet applicants while at the same time assuring your company does not run afoul of anti-discrimination laws. Certain pre-employment inquiries have insufficient job relatedness to outweigh their potential adverse effect on job prospects of individuals protected from discrimination. To avoid potential discrimination claims, firms should train employees not to ask applicants questions that relate to a protected status, such as questions about race, religious affiliation, national origin, citizenship, sexual orientation, marital status or family responsibilities, age, disabilities, pregnancy, genetic information or military service. Today employers are increasingly using social media to recruit and scrutinise employee candidates, but these sites could expose

employers to more information than they are legally allowed to ask during interviews. A common mistake is failing to have appropriate procedures in place to ensure social media searches are performed, or not performed, consistently on all candidates and that protected class information is not disclosed to hiring decision-makers.

RC: What regulatory changes have you seen in the US over the past 12-18 months? What has been the impact of the Fair Credit Reporting Act (FCRA)?

Hale: For the most part, significant regulatory developments affecting hiring come from the Equal Employment Opportunity Commission (EEOC). In 2012, a bit more than 18 months ago, the EEOC issued guidance on the use of arrest and conviction records in hiring. That guidance observed that using criminal records in hiring can have a disparate impact on minority group applicants. The guidance basically took the position that the fact of an arrest should not be a basis for rejecting an applicant, although conduct that led to an arrest could be a legitimate consideration, if the information is sufficiently reliable based on something other than the fact of the arrest. By contrast, the EEOC acknowledged that a conviction could be sufficient basis to show that an individual engaged in criminal conduct. At the same time, it said that a conviction should not be an absolute bar to employment. The

EEOC said that an employer should apply the three factors that were established in the case of *Green v. Missouri Pacific Railroad* in considering a conviction record. The 'Green factors' are the nature and gravity of the offense or conduct, the time that has passed since the offence or conduct or completion of the sentence, and the nature of the job sought. The Green factors were well accepted in the employer community as factors to consider before the EEOC guidance was issued. What is controversial about the EEOC position is that the EEOC said that the Green factors were only a 'starting point' and that an employer may in some cases need to go beyond the Green factors and apply several other factors in making an 'individualised assessment' concerning the relevance of a conviction to a hiring decision.

Salins: We have seen significant evolution in the regulatory environment of employment background screening in recent years. In April 2012, the EEOC issued enforcement guidance regarding use of arrest and conviction records in employment decisions, responding to what it considers a practice that disproportionately affects racial and ethnic minorities. Among other things, the guidance emphasises the need for criminal history information to be "job-related and consistent with business necessity", and encourages employers to make an "individualized assessment" before using criminal history in an employment decision. In an effort to enforce its guidance, the EEOC over the

last year brought disparate impact discrimination suits against numerous employers that have blanket criminal background check policies. We have also seen an increase in class-action lawsuits against employers regarding violations of the FCRA, the federal law that protects the privacy and accuracy of background information obtained by third party consumer reporting agencies. The claims include that employers failed to obtain from applicants or employees adequate authorisation to conduct background checks or failed to provide copies of background reports to applicants or employees before taking adverse employment actions. Recent settlements in these FCRA lawsuits have ranged between \$2.5m and \$3m.

Wray: Among the most significant regulatory developments in the past year is the publication in March 2014 by the Office of Federal Contract Compliance Programs (OFCCP) of rules requiring for the first time that federal contractors required to use affirmative action plans set a specific goal that 7 percent of each job group in their workforce be comprised of qualified individuals with disabilities. Additionally, a 'benchmark', which OFCCP says is not a 'goal' such as those applicable to women and minorities, must be adopted for military veterans. While special circumstances may warrant a higher or lower target, OFCCP has set a national benchmark of 8 percent which employers may adopt instead of analysing other availability data. The new rules

require employers to modify their affirmative action plans for plan years which begin after the rules went into effect. Employers are troubled by the requirement that they invite applicants to self-identify themselves as disabled at the pre-offer stage, fearing that this may lead to more claims by rejected applicants of discrimination even though the information will be kept as a record separate from the application. The FCRA has been in effect since 1968, but some smaller employers in particular are unaware of its requirements, and some small companies which specialise in background checks are also clueless. Where an employer conducts background checks itself, there are no FCRA implications. The FCRA only applies if an employer hires a third party to perform a background check on an applicant. In that instance the employer must obtain the applicant's written consent to conduct the check. Before the applicant is rejected based on information turned up by the agency, the employer must provide the applicant a copy of the report and furnish him or her information on how to contact the agency which furnished the report. FCRA does not require the employer to accept an applicant's claim that the report is false, or to wait any specific amount of time to fill the position while the applicant contests the report.

Berkowitz: There are new significant developments expanding the rights of whistleblowers. In March 2014, in *Lawson v. FMR*

LLC, the Supreme Court ruled in favour of granting broad whistleblower rights, under the Sarbanes-Oxley Act of 2002, to lawyers, accountants, investment advisers – and indeed, any other individual who is employed by a third party to provide services to a publicly traded company. Sarbanes-Oxley prohibits a public company, "or any officer, employee, contractor, subcontractor, or agent of such company", from discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against "an employee" in the terms and conditions of employment, because of whistleblowing or other protected activity. The Court held, "Legions of accountants and lawyers would be denied [Sarbanes-Oxley's whistleblower] protections", if Sarbanes-Oxley were not read to provide this remedy. Thus, it is not hyperbole to describe the decision as providing a sweeping new remedy for lawyers and accountants.

Oldham: The FCRA sets forth the permissible purpose guidelines for performing background investigations, and pre-employment is one of them.

RC: What is the significance of the new guidance on background checks, published by the US Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC)? What is the purpose behind the publication of this guidance?

Berkowitz: The new guidance signals that these two federal agencies are looking anew at employer practices in this area and are prepared to enforce them as necessary. The EEOC's principle concern is assuring that employers are not using background checks in a discriminatory manner. First, they want to be sure that, to the extent an employer uses background checks, it makes the decision to do so without regard to the applicant's particular protected status, whether race, religion, age, national origin, and so on. Next, they want the business community to be aware that certain minorities may be more negatively affected by the use of background checks. For example, minorities may be more likely to have criminal records than non-minorities; they may not have had the educational advantages of non-minorities; and women may be more likely to have credit issues. Even if the employer corrects for these potential disparities, the EEOC does not want employers to take different decisions, depending on the results they get in these checks, based on the employee's protected characteristics. Thus, for example, as the EEOC said, "if you don't reject applicants of one ethnicity with certain financial histories or criminal records, you can't reject applicants of other ethnicities because they have the same or similar financial histories or criminal records". The FTC's principle concern is assuring that employers comply with the federal FCRA, which imposes quite onerous requirements on employers who utilise background checks in their

hiring practices. The entire procedure, from gaining consent to making a hiring decision, is regulated. Among other things, the employer must provide the applicant, or employee, written notice of their rights under the FCRA, on a separate form; it must provide them notice in the event that it learns information concerning the applicant that may cause the employer to make an adverse decision; it must offer the applicant a reasonable opportunity to review and potentially challenge the information; and it must provide separate notice to the individual if in fact an adverse decision is taken as a result of the information. So, the new guideline sends the clear message that these important federal agencies are flexing their muscles in this area.

Wray: The EEOC has taken the lead, and the FTC has assisted, in trying to get out the word of longstanding but often unrecognised EEOC policy. The EEOC is concerned that many employers have adopted background check policies which have a discriminatory impact on certain minorities, particularly African-Americans and Hispanics/Latinos. With over 700,000 persons getting out of US prisons each year, a large number of whom are minorities, the potential impact is significant, and it is evident that joblessness contributes to recidivism. It has long been the position of the EEOC that any policy which has an adverse impact must be job-related and justified as a business necessity. The EEOC does not claim that criminal background

checks are unlawful, but states that arrest records should never be used to disqualify an applicant, as an arrest is not proof of a crime. An applicant may, however, be asked about the circumstances of an arrest, and any job-related information obtained from the inquiry may be considered. With respect to convictions, the EEOC warns that any policy which precludes hiring of any person ever convicted of any crime, or even of a felony, is very likely unlawful, as it will have a disparate impact and probably cannot be shown to be a business necessity. Instead, the EEOC counsels, an employer should consider on an individual basis the nature of the crime for which an applicant was convicted, the requirements of the job for which the applicant applies, and the time and conduct since the applicant was convicted or released from prison. Employers may apply a standard or matrix, for example “10 years since any conviction for theft for any position handling money”, but even then, the EEOC says, individual case by case consideration is required if the applicant cannot meet the standard. The EEOC has likewise claimed that credit checks may have a disparate impact on certain minorities and must therefore be job-related and consistent with business necessity. It has had difficulty sustaining this position in the courts, however, and one federal court of appeals recently accused the agency of suing a company “for using the same type

of background check that the EEOC itself uses”. It noted that the EEOC personnel handbook recites that “[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations”. Because of that concern, the EEOC runs credit checks on applicants for 84 of the agency’s 97 positions.

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Oldham: This guidance simply echoes the guidance set forth by the FCRA. Being on top of regulatory compliance is essential.

Salins: In a first-time collaborative effort, the FTC, which enforces the FCRA, and the EEOC jointly issued guidance on 10 March 2014 on the appropriate use of background checks by employers when making hiring and personnel decisions. Although this is the first official federal insight on

this topic since the EEOC's April 2012 guidance, it does not break new ground, but serves more as a reminder of employers' existing obligations under the FCRA and federal-nondiscrimination laws. The agencies emphasise that employers need written permission from job applicants before getting background reports about them from third party companies that compile background information. They also reaffirm it is illegal to discriminate based on a person's race, colour, national origin, sex, religion, age, disability or genetic information when requesting or using background information for employment. The fact that the EEOC and the FTC have collaborated to issue these guidelines reaffirm that both agencies consider this topic to be a priority and could potentially share information when enforcing laws concerning use of background checks.

Hale: In February 2014, the EEOC and the FTC published joint guidance on the use of background checks, with the EEOC focusing on avoidance of unlawful discrimination and the FTC focusing on compliance with the FCRA. The guidance was in two brochures—one for employers and the other for applicants and employees. The guidance broke no new ground. Instead, it described the basic requirements in plain language terms. At least on the surface, it appears that the purpose of publishing this guidance was to provide easily understood advice about implementing background checks,

particularly when they disclose criminal record information. Certainly that is what the EEOC said. In its press release concerning the guidance, the EEOC said that the purpose was to provide "user-friendly technical assistance to our stakeholders". It had been reported since the EEOC's issuance of its guidance on the use of criminal records that the EEOC would be addressing the subject of the use of credit records in employment. It has not done so yet. Indeed, the joint guidance comments on the use of criminal records in employment decisions without addressing the use of credit records. As with criminal records, the case can be made that using credit records in employment decisions can have a disparate impact on members of minority groups. By the same token, many employers consider credit history to be an important factor in assessing applicants, at least for positions that will involve ready access to funds. It may be that the joint EEOC-FTC guidance was a preliminary step and that more potentially controversial guidance focusing on the use of credit records in employment decisions is still to come.

RC: How has the new guidance been received by the business community? What main criticisms have emerged?

Wray: The business community's reaction has been mixed. Some larger employers, having dealt with the issue in the past, regard the new guidance



as 'old news'. EEOC states, however, that the percentage of employers using the individualised assessment approach has increased from 32 percent to 88 percent in one year. A number of employers, both large and small, are concerned that compliance with EEOC's position may put them at risk under some state laws which, for example, prohibit hiring of felons into a particular job. EEOC regards any such state laws as pre-empted, or trumped, by the federal laws it enforces. Another voiced concern is that the individualised assessment EEOC advocates could result in disparate treatment claims. Employers are also concerned about the ambiguity inherent in the 'individualised assessment' balancing act and fear that their good faith individualised assessments may be second-guessed. Moreover, many in the business community regard this guidance as yet

another effort by the government to act as a 'super personnel agency' interfering in legitimate business decisions without statutory authority to do so.

Berkowitz: The concern of the business community is that the guidance does not take sufficient account of the legitimate need for employers to conduct background checks in an increasingly dangerous world. It also purports to set forth burdensome new so-called 'requirements' for employers in carrying out background checks. While the guidance does not have the force of law, the EEOC will certainly assess employers' practices based on the extent to which the guidance is followed, and at least some courts may defer to the EEOC's expertise and find them to have the force of law. Employers are also concerned by the EEOC's

aggressive litigation in this area – the EEOC recently filed several lawsuits alleging that employers violated federal anti-discrimination law by implementing and utilizing criminal background check policies that resulted in employees being terminated and others being screened out for employment.

Oldham: The business community must be committed to being compliant with all guidance and regulations. We have not heard any criticisms as a result of work in the background investigations business.

Salins: The new FTC/EEOC guidance has been viewed as a clear and concise review of existing rules. Yet, the EEOC's April 2012 guidance has been subject to severe criticism which is not addressed by the new guidance. In July 2013, Attorneys General from nine states sent a complaint letter to the EEOC, accusing it of unlawfully expanding the scope of Title VII to cover "former criminals" and urging it to reconsider its stance on background checks. In February 2014, the EEOC's 2012 guidance came under fire by a report from the US Commission on Civil Rights, in which commissioners criticised the guidance as "deeply flawed" because it misapplies disparate impact theory. The EEOC has not been successful in litigations it has pursued in this area, most recently in *EEOC v. Kaplan Higher Education Corp.*, in which

the Sixth Circuit chastised the EEOC for using flawed methodology to try to prove use of credit checks as a pre-employment screen had an unlawful disparate impact against Black applicants. Despite the criticism and litigation losses, the EEOC has continued to defend its position on criminal background checks to date.

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Hale: Frankly, I do not believe that the EEOC-FTC guidance has led to any serious concerns or criticisms by the business community. The guidance simply summarises the applicable legal standards. I anticipate that if the EEOC issues guidance concerning the use of credit records in employment decisions, that will be scrutinised closely and may well lead to criticisms if it goes beyond established law.

RC: Could you comment on the relationship between state and federal anti-discrimination laws in the US? What similarities and discrepancies exist, and what challenges can arise from this for employers?

Salins: Many states and cities have anti-discrimination laws that provide greater protections than federal laws. For example, some state and local laws make it unlawful to discriminate based on political activities and legal recreational activities outside of work hours, so questioning applicants on those topics, or making decisions based on such activities revealed on social media sites, should be avoided. With respect to background information, a growing number of state and local governments – including Hawaii, Massachusetts, Minnesota and Rhode Island – have passed ban-the-box laws. These laws outright prohibit or severely restrict employers from asking applicants about criminal history in the initial employment application before either conducting an interview or making a conditional offer of employment. In addition, laws limiting employer use of credit history for hiring and personnel decisions are currently in effect in 10 states: Colorado, California, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. Employers with operations in multiple states and localities that would like uniform

employment policies may opt to comply with the law of the most restrictive jurisdiction in all locations.

Hale: In most respects, the substantive legal standards are the same. By the same token, the procedural standards and the standards concerning damages can make a significant difference. The most substantial substantive difference between some states' laws and federal law concerns sexual orientation. There is no federal law prohibiting discrimination in employment based on sexual orientation. However, many states expressly prohibit employment discrimination based on sexual orientation. In some areas, different legal standards can apply within areas of discrimination that are prohibited by both federal and state law. For example, under federal law, an employer is not necessarily automatically liable for sexual harassment by a supervisor that results in a hostile environment, if the employer can establish certain defences and there has been no tangible employment action. In some states, however, an employer is automatically liable, without any opportunity to establish the defences that are available under federal law. Damages in employment discrimination cases can be significantly different, depending on whether a lawsuit is based on federal or state law. For example, damages for emotional distress and punitive damages are limited under federal law to caps of between \$50,000 and \$300,000, depending on the size of the employer. At

least in many states, no such caps exist. Moreover, if an employer and a plaintiff-employee are citizens of the same state and the employee sues solely under state law, the plaintiff-employee can file the lawsuit in state court and preclude the employer from removing it to federal court. Although courts and judges are far from uniform, the usual reputation of federal courts is that they are more probing in assessing whether there is a sufficient basis for a case to survive an employer's motion to dismiss or an employer's motion for summary judgment, either of which can result in dismissal without a trial. In short, on a day-to-day basis, differences between federal and state discrimination laws generally do not affect how an employer manages human resources or hires or supervises employees. However, once litigation is threatened or filed, the law that applies can make a difference in the potential consequences for an employer. Of course, in some other areas outside the discrimination law arena, such as overtime pay and leaves of absence, there can be significant state-by-state variations and significant differences between state and federal law. Those differences can result in increased complexity for employers managing multistate operations.

Oldham: State and Federal anti-discrimination laws have existed for a very long time. Again, compliance is the key.

Berkowitz: Federal anti-discrimination laws establish a baseline for employers, but many states and municipalities provide protections that go well beyond federal laws. There are a number of key differences. In terms of disability discrimination, the definition of 'disability' is often far broader under state law than under the federal ADA – thus, for example, an employee or applicant who is suffering a passing illness might not be disabled for the purposes of the ADA, but may be under New York State or New York City law, and the employer may have a legal obligation to make a reasonable accommodation to the individual, who might also be protected against adverse employment decisions based on the disability. In terms of sexual orientation discrimination, federal anti-discrimination law does not explicitly prohibit employment discrimination based on sexual orientation, the laws of many states and municipalities do prohibit this. For example, in New York, the law prohibits discrimination based on *actual or perceived* sexual orientation – heterosexuality, homosexuality, bisexuality or asexuality. Regarding age discrimination, the federal Age Discrimination in Employment Act (ADEA) prohibits discrimination only against individuals who are age 40 or over, and the law generally is intended to protect older individuals from discrimination in favour of younger individuals; but state laws may be closer to the UK model, and simply prohibit discrimination on the basis of age, so long as the individual is aged 18 or over, and regardless of

whether the discrimination is based on relative age or relative youth.

Wray: Employers in the United States must comply not only with federal law, but with state law and local ordinances, at least to the extent that state and local legislation does not contravene federal law. Discrimination on the basis of sexual orientation is often cited, as it is not currently prohibited by federal law, but it is prohibited in many states, and by many local ordinances. Most states have their own human rights agencies, which may have different procedures and notice posting requirements. Minimum wage and overtime requirements more stringent than those of the federal government are permitted and exist in many states. Additionally, some states, including California, Illinois, Connecticut and Maryland, prohibit the use of credit information by employers unless certain exceptions apply. Keeping up with these varying requirements can be a challenge to companies. That said, most employers are able to operate the same way across the nation with respect to their dealings with employees. Few employers of any size discriminate on the basis of sexual orientation or marital status, as examples, regardless of whether such discrimination is prohibited in a particular jurisdiction. Likewise, with the exception of California and Montana, absent agreement

between an employer and employee, employment in the United States is 'at will', meaning that either the employer or the employee may terminate the relationship without notice or cause for any or no reason unless the reason is one prohibited by law. No prudent employer in any state would sack an

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employee without a legitimate reason, however, since it may be called upon to justify itself in the face of a discrimination, whistleblower, or other claim.

RC: What steps can companies take to reduce risks arising from new employees yet still comply with state and federal employment laws? What policies and procedures should they implement?

Oldham: With regard to what we do, employers should require that each new prospective employee

sign a Pre-Employment Release and Authorisation Form, giving permission for the employer to hire a background investigation firm to verify all information in the employment application and perform additional investigations, including media, civil and criminal litigation history, judgments, tax liens and bankruptcies.

Berkowitz: Companies need to be very careful that they are retaining employees as employees and not as consultants or independent contractors. If the individual is reporting to work at set times, to a particular individual, and taking direction; if the individual is performing work to the standards of the company; if he or she must report to the job and does not have the discretion to send a replacement – as might happen, for example, if you retain a painter or carpenter to work on your house; if the individual has a company desk or office, and is given a company phone or email address, and a business card; if the individual does not have a separate corporation to which you are writing the cheque; then the individual is likely to be considered to be an employee and not a contractor. Companies need to be very sure that they properly classify new hires as either exempt or non-exempt from the federal and state laws mandating payment of overtime. This requires a careful analysis of their job duties. Getting it wrong can result in liability for unpaid overtime wages for up to three years, plus liquidated damages and attorneys' fees. These cases are most frequently

brought as collective actions – a 'class action' hybrid – and so they are extremely costly, and liability of often off the charts. Companies need to standardise hiring practices and provide training to managers as well as human resources professionals who are involved in the process. Of course, employers also need to be sure that those making hiring decisions are not asking candidates unlawful questions, such as those dealing with pregnancy, maternity leave, marital plans, retirement plans, childcare and other hot-button issues.

Wray: Despite the hurdles erected by federal agencies, background checks of applicants remain a valuable tool for avoiding hiring of untrustworthy or potentially violent applicants. Additionally, the information submitted on applications should be carefully checked and each applicant carefully interviewed. Of course, inquiries which elicit disclosure of racial or ethnic status or religion should be avoided. Where a company uses an outside agency to verify applications, the agency should be one that does not report medical information or employment-related litigation to the company even if it is volunteered by the applicant. It is wise to have a written instruction to, or a written verification from, the agency to that effect. Companies should not only learn the applicable law when first going into a jurisdiction, but should make regular updates a priority. Employer associations, human resources

professional associations and law firms are good sources of information.

Salins: Conducting background checks on prospective employees is good practice to keep the workplace safe, protect the company's assets and avoid negligent hiring claims. Employers who rely on background checks should familiarise themselves with the EEOC's April 2012 enforcement guidance, and re-examine their procedures in light of such guidance. For example, employers are advised to: only ask for information relevant to the duties of the position; when a credit report or criminal background check reveals issues, do an individualised assessment by informing the applicant he or she is being excluded because of an unfavourable report, and providing the applicant with a chance to explain the credit report or criminal background check; and justify any exclusion based on criminal history in light of the nature of the crime, the time elapsed and the nature of the job. Furthermore, employers should ensure their procedures comply with applicable state and local laws that restrict the type of background information employers may solicit from an applicant.

Hale: First, make sure to have a rigorous and systematic process for considering applicants. Use reference checks and background checks. Also use social media, but do not engage in deceptive

practices and be careful not to use information that cannot be considered. Second, have all applicants sign an employment application. That helps to ensure the receipt of consistent information concerning applicants. In addition, the employment application can be a useful vehicle for obtaining an acknowledgment of the at-will nature of employment and obtaining an authorisation of background checks for FCRA purposes. Note that a separate sheet notifying applicants of the possibility of background checks also needs to be provided. The employment application can also include an agreement by applicants to waive any claims associated with providing references. Such a waiver can be useful in encouraging possible references to provide reference information. Third, train employees who are involved in interviewing and selecting employees on what are permissible considerations, what are impermissible considerations and what traps to avoid in conducting an interview. Fourth, ensure that there is a systematic documentation process. That includes obtaining and preserving I-9 forms and managing employment-related agreements, including countersigning agreements. Finally, as should go without saying, have a comprehensive equal employment opportunity policy, including the provision of reasonable accommodations in the hiring process, as well as during employment

RC: What final advice can you offer to companies on minimising and mitigating

employment risks associated with potential new employees?

Hale: Do not skimp on the investment in the hiring process. Make sure to cast a wide net. That will maximise the likelihood of bringing in the best candidates. It will also help in developing a diverse applicant pool. Then be probing in the process, focusing on the skill sets of prospects and obtaining information from a variety of sources. Many lawsuits by terminated employees are the ultimate result of a poor hiring process. Establishing a comprehensive and systematic process and implementing it rigorously is an employer's best means of avoiding employment litigation and hiring the most effective workers.

Salins: Engaging third parties to conduct background checks is a good approach to avoid obtaining applicants' protected class information but, given the high stakes litigation in this area, employers should be sure to comply with all requirements of the FCRA and similar state laws when doing so. While employers face the task of deciding whether to screen for applicants' criminal histories and face the risk of an EEOC enforcement action or whether to hire individuals with criminal backgrounds and face lawsuits alleging, for example, negligent hiring claims, the continued failure of the

EEOC to succeed in these lawsuits leaves this an area of continued uncertainty. Employers are advised to stay abreast of any new guidance issued by the

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*Robert M. Hale,
Goodwin Procter LLP*

EEOC, new state and local laws pertaining to criminal records and credit reports and other developments in this area.

Wray: Companies may wish to watch the 'ban-the-box' movement, which refers to the fact that inquiries concerning convictions are often in a box on employment applications. Eleven states and over 50 cities and counties have enacted laws that require public or private employers to postpone an inquiry concerning criminal convictions or a background check until after a tentative hiring decision has been made. The theory is that this will give job-seekers the opportunity to be reviewed on

their qualifications first. If an employer is required to adopt or voluntarily adopts such a policy, it should avoid any temptation to make the inquiry or conduct the background check at the same time it asks for medical information, as there must be a conditional offer of employment contingent solely on the medical review before a medical inquiry lawfully may be conducted.

Berkowitz: Companies need to recognise that we do things differently in the US. We are well known for our 'employment at will' concept, but many foreign employers misconstrue the term, and believe that it's permissible to fire someone with no reason at any time. Employers may also feel that this doctrine reflects a general *laissez faire* attitude on employment practices in the US, but nothing could be further from the truth. US hiring and employment practices are highly regulated, both by statutory law, which may be federal, state or local, and by common law. As a result, an employer doing business in the

US needs to consider what may be highly divergent employment law requirements, depending on where the business is established. At the end of the day, though, employers do thrive in the US. Employers need to put in place policies that make clear what their practices are, and that reflect legal requirements. Many laws pose specific requirements at the time of hire, including in particular the prohibitions of non-discrimination laws, the stringent requirements of employee classification laws, and myriad employee notice requirements. Employers who take the time to engage professional assistance, who hire knowledgeable human resources executives, and who provide training to all employees on their rights and responsibilities under US law, can navigate our system with great success.

Oldham: Companies should hire an outside competent firm to do a thorough background investigation of each new hire prospect, regardless of their ranking within the organisation. **RC**