

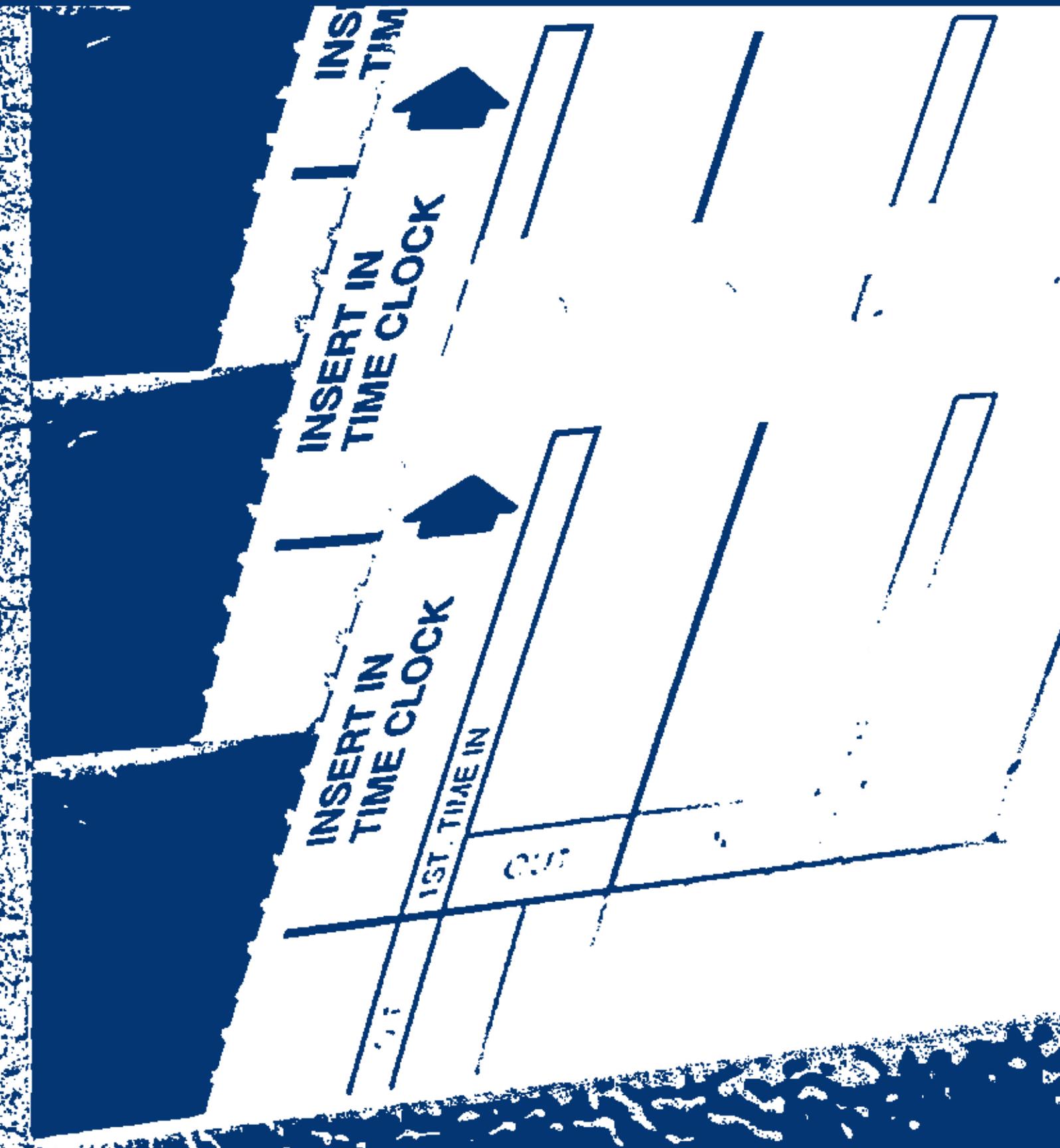


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Be careful what you ask: ground rules for foreign employers conducting job interviews in the US: a case study

Introduction

The maze and layers of federal, state and local employment laws in the US can create a minefield of potential liability for a foreign-based employer. It has been our experience that foreign employers are sometimes completely surprised to learn that, for example, it is illegal to fire an employee because she is pregnant; that paying an employee a 'salary' does not necessarily defeat their right to be paid for overtime; that different safeguards must be followed when terminating an employee over the age of 40; and that certain accommodations must be made in recognition of an employee's disability or religious beliefs. Nowhere is this misunderstanding more prevalent than in the process of interviewing job applicants for open positions.

The following case study and analysis illustrates the applicable rules, as well as the potential liability facing an unwitting prospective employer. Hopefully, most employers will be able to spot some of the errors made by the employer in this hypothetical situation.

Facts

The interview

Fifty-two-year-old Karen Gold, formerly Manager of Marketing at Cont-X Industries for ten years, has responded to a newspaper advertisement for a position as US Director of Marketing and Product Development with the International Container Company (ICONCO). ICONCO is a UK-based company, with US headquarters in the New York suburbs. David Burtack, ICONCO's President, was highly impressed with Gold's resume and invited her to ICONCO's offices for an interview.

Personal questions

At the beginning of the interview, Burtack reviewed Gold's educational background, prior employment and professional achievements in the container industry. When Burtack inquired about Gold's reason for leaving her last position at Cont-X, Gold explained to Burtack that she had resigned because she is the mother of a newborn child and the 90-minute one-way commute between her home and Troj-X's offices created a hardship. By contrast,

the five-minute walk to ICONCO's offices would be much more convenient. Burtack asked whether Gold's husband would be available to watch their child after work, due to the frequent evening marketing and client meetings Gold would be required to attend. Gold told Burtack that she is not married, but is raising the child – who is adopted – with her lesbian partner. She stated that the after-work meetings do not pose a problem, but that after she is hired she would like to take a four-week unpaid leave of absence because she has learned that her daughter will require heart surgery prior to her first birthday. Burtack expressed concern about the impact these medical expenses would impose on ICONCO's medical plan, as well as the effect of Gold's extended absence.

More questions

Later in the interview, Burtack informed Gold of ICONCO's stringent anti-drug policy. In response, Gold stated that she had been arrested for smoking marijuana while attending a Grateful Dead concert while a student at Cornell University. She no longer uses illegal drugs of any kind, but smokes cigarettes on weekends. Burtack responded that too would be a problem, as ICONCO's founder was an avid non-smoker, so that ICONCO not only prohibited smoking in its offices, but it was a strict ICONCO policy not to hire individuals who used tobacco products. In any event, Burtack explained that as a matter of company policy, it would be necessary for Gold to submit to and pass a physical examination before any offer of employment could be extended to her.

The employment decision

Several days after their initial meeting, Burtack telephoned Gold. He informed her that, although he was impressed with her industry experience and the marketing ideas she had outlined, he was concerned that she would have trouble 'fitting in' with the ICONCO 'family' and, as a result, he had decided to offer the position to another candidate – a recent college graduate.

When Gold asked him to be more specific, Burtack stated that ICONCO prided itself on the high moral integrity of its employees and that Gold's prior drug use, personal habits and unusual lifestyle were inconsistent with that image.

The assistant

Norine Sunshine, Burtack's executive secretary, who overheard part of the interview, told Burtack she believed some of his statements and questions violated employment discrimination laws. Burtack told Sunshine to mind her business and that if she complained about this again, she would be fired. Concerned that his secretary might have a point, Burtack immediately contacted the company's labour attorney for his opinion.

Analysis

Legal setting

Federal, state and local laws in the US prohibit employment decisions, including hiring, to be based on an individual's race, age, sex, religion, national origin, marital status or disability. Because employment decisions must be premised on bona fide job-related factors such as qualifications, experience and ability to perform the position, pre-employment inquiries into those 'protected' areas are generally forbidden and are ill-advised. Indeed, most state fair employment practice agencies have made available charts or other publications regarding the types of pre-employment inquiries that must be avoided.

Areas of potential liability raised

The Burtack-Gold exchange underscores the potential liability an employer faces when it permits its pre-employment inquiries to include subjects unrelated to the particular job that the applicant seeks.

Presumptive qualifications

Here, Burtack acknowledged Gold's educational background and prior experience presented prima facie qualifications for the position. His failure to hire Gold based upon their meeting suggests that his decision that she would not 'fit in' the ICONCO family was based on other unlawful factors which may provide the basis for one or more discrimination claims by Gold.

Family issues

Burtack's inquiries about Gold's spouse or children are problematic. They are unrelated to her job qualifications. It would have been

preferable simply to inquire whether working late would pose a problem if overtime or unusual hours are required.

Sexual preference

If Burtack's employment decision was based on Gold's sexuality, there is probably no violation of federal law. The protections of Title VII do not *yet* extend to sexual preference or orientation. However, an increasing number of states and municipalities (New York City and San Francisco are among the forerunners) have enacted statutes and executive orders that prohibit discrimination for this reason.

Record of disability

The Americans with Disabilities Act (ADA) prohibits denial of employment on the basis that the employee or an employee's dependent has a medical condition which would impose a financial burden on the employer's medical plan. However, it may be permissible for an employer to abide by the provisions of a medical plan which, for example, exclude pre-existing conditions or impose limitations on coverage amounts. The ADA also prohibits Burtack from basing an employment decision on an employee's prior – as opposed to current – drug use. Here, ICONCO's refusal to hire Gold based upon her marijuana use 20 years earlier would likely grant Gold various legal protections and should not provide the legitimate basis of a current employment decision.

Arrests and convictions

Similarly, denial of employment based upon an arrest is almost universally prohibited in the US. Moreover, EEOC regulations and a number of states and localities now also prohibit employers from making employment decisions on the basis of a conviction that is neither recent in time nor having a demonstrable nexus to the job at issue. Thus, while a fairly recent conviction for embezzlement would clearly disqualify an applicant for a senior financial position, an 'old' conviction for domestic abuse or drunk driving should probably not.

Medical examination

In addition, the ADA would make it illegal to require Gold to pass a physical examination before extending a job offer to her. By contrast,

an employer may make a job offer conditional on a medical exam provided that certain procedural requirements are met and the exam results are not used in a discriminatory manner. A drug test, standing alone, does not fall within the ADA's definition of a medical exam.

Family leave

Under the Family and Medical Leave Act (FMLA), an employee may request up to 12 weeks' leave for the serious medical condition of a natural or adopted child. Here, however, Gold would not be eligible for FMLA leave until she had been employed by ICONCO for one year.

Off-duty conduct

Smoking in the US has become increasingly politically incorrect. As a result, it is plainly permissible for ICONCO to prohibit smoking in its offices. However, a number of jurisdictions, including New York and New Jersey, now expressly prohibit an employer from discriminating on the basis of an individual's lawful, off-duty activities. For example, an employee cannot be denied employment because of his or her political party affiliation. Gold's use of tobacco on weekends would clearly be so protected.

Age protections

In the US, the Age Discrimination in Employment Act expressly prohibits discrimination against employees because they are over the age of 40. Gold could clearly claim that, based upon Burtack's admissions to her, she possessed the minimum qualifications and experience for the Director of Marketing position and that the decision to hire a 'recent college graduate' with evidently inferior credentials must have been based upon that fact that Gold is over 40 years of age. Should Gold file a claim of age discrimination, she would state a *prima facie* case. ICONCO would then have to articulate a legitimate business reason other than Gold's age to justify its decision not to hire her.

Retaliation

Finally, Burtack's threatening comments to his secretary may constitute unlawful retaliation. Generally, federal and state law protects employees who 'oppose discrimination' against termination, demotion or other retaliatory actions, on account of their actions.

Recommendation

To ensure that hiring decisions are not made based on illegal or discriminatory factors, it is essential that the job interview focus on the applicant's job-related qualifications, experience and ability, rather than extraneous factors, which touch upon an individual's protected status.

The recent explosion of employment legislation has created a minefield, which can create potential liability for unschooled employers who continue to make employment decisions on the basis of impermissible factors. In the selection process, it is essential to stick to permissible areas of inquiry and to carefully document the rationale for declining to hire any given applicant.