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HIRING AND ONBOARDING TALENT:

WHAT FINANCIAL SERVICE EMPLOYERS NEED TO KNOW NOW

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DEI and Hiring

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Title VII and Hiring

- Title VII generally prohibits employers from discriminating **against** and **in favor of** candidates on the basis of race, color, gender, national origin, or religion.
  - The Supreme Court and the EEOC have read a limited exception to this rule for certain voluntary affirmative action programs into Title VII.

Title VII and Hiring

- Most employer DEI recruitment and hiring strategies are **not** implicated by this prohibition as they do not make race, gender, or other protected characteristics a factor in hiring decisions
  - Examples include targeted recruitment at historically black or minority universities, making experience with diverse teams a job qualification factor, and diverse slate requirements.
- However, programs that are race- or gender-conscious can create legal risks
  - Examples include sponsored internships or fellowships limited to persons of a certain race, gender, gender identity, or sexual orientation
  - We have seen an uptick in legal challenges to these kinds of programs as well as race-conscious charitable initiatives

Reverse Discrimination Claims

- *Damore v. Google*, 2018 WL 317984, No. 18CV321529 (Jan. 8, 2018)
  - Class action on behalf of white male employees alleging race/gender were determinative hiring factors.
- *Wilberg v. Google*, 2018 WL 1135688, No. 18CIV00442 (Jan. 29, 2018)
  - Former YouTube recruiter alleged that the Company has written policies that systematically favor diverse job applicants.
- *Duvall v. Novant Health, Inc.*, No. 3:19-cv-00624 (W.D.N.C. Oct. 26, 2021)
  - Federal jury awarded $10 million in damages to executive who alleged he was fired because he was a white man and employer was trying to diversify its workforce
- *Bolduc v. Amazon*, No. 4:22-cv-615 (E.D. Tex. July 20, 2022)
  - Alleges that "Diversity Grant" program that offers $10,000 for diverse entrepreneurs violates Section 1981.
- *Phillips v. Starbucks Corp.*, 2022 WL 3913373, No. 1:19-cv-19432 (D.N.J. Aug. 31, 2022)
  - Alleges reverse discrimination when she was fired after calling police to report two Black customers. ER lost SJ.
- *Do No Harm v. Pfizer*, No. 1:22-cv-07908 (S.D.N.Y. Sept. 15, 2022)
  - Alleges that Breakthrough Fellowship Program is racially discriminatory as it excludes white and Asian American applicants.

Supreme Court Affirmative Action Cases

- The Supreme Court is currently considering a challenge to the legality of race-conscious admission programs in higher education under Title VI of the Civil Rights Act and the Equal Protection Clause.
- The cases are ostensibly limited to higher education and the Supreme Court's prior precedent in that area, but the manner in which the Supreme Court rules could **heighten** the legal risk associated with a range of employer DEI strategies.

Relevant Precedent & Case Background

- Seminal case: *Regents of the University of California v. Bakke* (1978)
  - The Supreme Court in 2003 reaffirmed *Bakke* in *Grutter v. Bollinger*, and again in 2016 in *Fisher v. University of Texas*
- Students for Fair Admissions (SFFA), a legal advocacy group seeking to end the use of race in university admissions programs, filed cases against Harvard and UNC
  - SFFA argued that Harvard's program violates Title VI by using race as a factor in admissions and limiting Asian American acceptance rates compared to those of other similarly qualified students through "racial balancing"
  - SFFA argued that UNC's process violates Title VI and the US Constitution by considering race

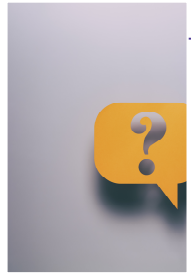
Issues Raised at Oral Argument on October 31, 2022

The justices focused on a number of issues during the five-hour hearing, including:

How do you advance diversity without considering race? Considerable discussion concerned how universities can advance diversity if they are not permitted to consider race in any form

When is diversity achieved? The conservative justices were particularly concerned with how UNC and Harvard defined diversity and at what point they could say they achieved their diversity goals as related to race

Were any applicants harmed by the admission process at UNC or Harvard? Both schools stressed that they never used race as a determinative factor in admissions and instead considered it as one of many elements in a holistic analysis of a candidate. Justice Jackson questioned whether this constituted a concrete and remediable harm, especially because neither university required that applicants disclose their race



There were also extended discussions on the importance of diversity in higher education to other institutions, such as employers and the military, and the potentially broad impact a decision to overrule *Grutter* would have

Implications for Employers

- The Supreme Court has recognized that diversity in higher education is a compelling interest that can justify narrowly tailored consideration of race in admissions
- The Court has not recognized a similar exception for consideration of race by private employers or foundations, but the case law supporting corporate DEI initiatives and use of race in higher-education admissions are closely intertwined

Implications for Employers

- If SCOTUS prohibits consideration of race under the Equal Protection Clause or Title VI, courts may read the language in Title VII, Section 1981, and other antidiscrimination statutes in a similarly narrow fashion. That could call into question many hiring and recruitment programs meant to advance DEI
- The decision may also affect affirmative action in federal government programs and federal contracting
- Restrictions on employer DEI efforts could be detrimental to company innovation and profitability, the ability to recruit and retain diverse talent, transparency related to DEI initiatives, and workplace culture
- Employers should review their existing DEI and race-conscious charitable initiatives for risk

Salary Transparency

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Wage/Salary Range Disclosure Laws

State/Region	Disclosure Required with Job Posting	Disclosure Required upon Request	Disclosure Required Upon Conditional Offer
California	X (effective 1/1/23)	X (when requested after initial interview is completed – applicable through 12/31/22; thereafter, upon request for applicants/employees)	
Colorado	X		
Connecticut		X (at applicant's request or when offer is made, whichever is earlier)	X (at applicant's request or when offer is made, whichever is earlier)
Maryland		X	
Nevada		X (after initial interview is completed)	
New York–Ithaca	X		
New York–NYC	X (effective 11/1/22)		
New York–Westchester County	X (effective 11/6/22)		
New Jersey–Jersey City	X		
Ohio–Cincinnati		X (when requested after conditional offer provided)	
Ohio–Toledo		X (when requested after conditional offer provided)	
Rhode Island		X (effective 1/1/23; before discussing compensation, or earlier at applicant's request)	X
Washington	X (effective 1/1/23)	X (when requested after conditional offer provided – only applicable through 12/31/22)	

Note about Nevada: *Required to disclose salaries to candidates, after an interview, even if they don't request it; salary disclosure for current employees applying for promotions or transfers is only required if they request it.*

Colorado: First State to Require Compensation Be Included in Every Job Posting

In 2021, Colorado enacted a law that requires employers to include the compensation and general benefits for the position in all job postings for positions located in Colorado (or that can be performed virtually from Colorado).

Employers must include the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position. This compensation range may extend from the lowest to the highest pay that the employer, in good faith, believes it may pay for the particular job.

Additionally, employers in Colorado must:

- Make accessible to all Colorado employees postings for all company jobs, regardless of whether the employee is qualified for the position or the position can be performed in Colorado; and
- Make accessible to all Colorado employees postings for all company promotion opportunities, regardless of whether the employee is qualified for the promotion or the position can be performed in Colorado.

New York City to Require Compensation in Job Postings

- Must include minimum and maximum potential salaries in all job postings, effective 11/1/2022.
- Employer must make a "good faith" determination at the time of the job posting of the lowest and highest salary it would pay for that position.
- NYCCHR Guidance:
  - "An 'advertisement' is a written description of an available job, promotion, or transfer opportunity that is publicized to a pool of potential applicants."
- Possible civil penalties of up to $250,000 per violation.
- Current employees can bring a private cause of action seeking damages and attorneys' fees.
  - Prospective candidates have no private cause of action.

California to Require Pay Scales in Job Postings

- Effective January 1, 2023, employers with 15 or more employees must include the pay scale for a position in any job posting that they post directly or through a third party.
- "Pay scale" means the salary or hourly wage range that the employer reasonably expects to pay for the position.
- Applicants may reasonably request the pay scale for the positions they are applying for and employees may request the pay scale for their current positions.
- The Labor Commissioner may order the employer to pay a civil penalty of $100 to $10,000 per violation. No penalty applies on the first violation of the law, provided that the employer demonstrates that it has updated its job postings to include a pay scale as required.
- Individuals may file civil actions for injunctive relief and "other relief the court deems appropriate."

Washington to Require Pay Scales in Job Postings

- Effective January 1, 2023, employers with 15 or more employees must disclose in each job posting the salary range and a general description of all of the benefits and other compensation (discretionary and nondiscretionary) to be offered to the hired applicant.
- Penalties include civil penalties from $500 to $1,000 per violation.
- Individuals can bring a private cause of action seeking damages (awarded in the minimum amount of $5,000) and attorneys' fees.

Drug Testing

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"State" of the Law for Employment-Related Drug Testing

- A number of states have enacted laws that require employers to implement specific processes and procedures *if* the employer chooses to conduct pre- or posthire drug testing.
- These requirements include (1) implementing a specific policy and providing that policy to employees, (2) providing notice of a positive drug test, and (3) conducting confirmatory testing of any preliminary positive result.
- States where financial services companies are primarily located (e.g., New York State, California, and Illinois) have not enacted such laws, but if an employer is hiring nationally it should bear in mind any state-specific obligations before implementing that program.
- Most of these laws have been in effect for 10+ years. The newest wave in drug–testing related laws largely focuses on the permissibility of THC testing.

Limitations on Pre-Hire THC Testing

Cities like NYC and Philadelphia have enacted laws that categorically prohibit conditioning employment on a pre-hire drug test that includes THC unless the position meets a narrow definition of safety-sensitive.

Other jurisdictions (e.g., New York State and Maine) have enacted laws that prohibit employers from basing any adverse employment action on a test that is positive for THC (recreational and medicinal) unless there is evidence of on-the-job impairment, which effectively precludes no-hire decisions based on a positive result.

New York Marijuana Regulation and Taxation Act

The Marijuana Regulation and Taxation Act, which modified New York Labor Law Section 201-d, provides that an employer may only prohibit off-duty use or base an adverse employment action on an individual's off-duty marijuana use if:

- The employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate;
- The employer would be in violation of federal law if it failed to do so;
- The employer would lose a federal contract or federal funding if it did not do so; or
- The employee, *while working*, manifests specific "articulable symptoms" of cannabis impairment that decrease *or* lessen the employee's performance of the employee's tasks or duties or that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.

California's Recent Restriction on THC Testing

- California's AB 2188 amends the California Fair Employment and Housing Act (FEHA).
- The law becomes effective on January 1, 2024.
- The law makes it unlawful to discriminate against (1) an applicant or employee who has engaged in the lawful use of marijuana outside of work, and (2) employees and applicants on the basis of a drug test that measures only "nonpsychoactive cannabis metabolites."
- The second prohibition will limit the types of samples an employer can use to test for THC. Urine and hair specimens measure THC that is not metabolically active, but saliva/oral fluids and blood tests may measure active THC molecules, if designed and manufactured to measure only the psychoactive THC components in the sample.
- Next steps: evaluate utility of marijuana-testing program in California that has been legalized and (if useful) work with drug-testing vendors to ensure that testing procedures comply with the law.

Artificial Intelligence (AI)

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How AI Can Be Used in Recruiting and Hiring

Artificial intelligence in hiring involves the use of technology to automate aspects of the hiring process.

- Writing job descriptions
- Deciding where to post/advertise jobs
- Reading résumés and making first round of cuts
- Interviewing candidates
- Following up with candidates
- Selecting of candidates

Risks of AI in Employment

- Potential discrimination lawsuits
  - Does the use of AI reduce the role of the individual hiring manager's biases or does it reproduce and deepen systemic patterns of discrimination reflected in today's workforce data?
- Risk of class actions
  - Failure-to-hire claims are usually individualized and thus not suitable for a class action
  - But will the use of AI create a common issue that makes the case a good candidate for a class action?
- Risk of disability discrimination
  - US law protects job applicants from disability discrimination and requires that applicants with a disability be accommodated
  - The Americans with Disabilities Act (ADA) and state and local laws also limit an employer's ability to make disability-related inquiries at the recruiting stage
  - Applicants may have disabilities that are negatively impacted by AI tools, particularly speech patterns, facial expressions, or disabilities that affect movement
  - The further a job evaluation strays from the essential functions of the job, the more likely it is to be discriminatory

New York City Law

- Effective on January 1, 2023
- It is unlawful for an employer to use an automated employment decision tool (AEDT) to screen candidates for employment or promotion in New York City unless:
  - the tool has undergone a bias audit no more than one year prior to its use;
  - a summary of the most recent bias audit is made publicly available on the employer's or employment agency's website; and
  - the candidate or employee is notified at least 10 business days in advance of the interview that AI will be used and is told the job qualifications and characteristics that the tool will assess
- "Employment decision" means "to screen candidates for employment or employees for promotion within the city"
- The candidate or employee must have an opportunity to request an alternative selection process
- May result in civil penalties for each day the AI tool is used

New York City Law

- The NYC Department of Consumer and Worker Protection recently published proposed rules providing guidance on the NYC AI law. Among other things, the proposed rules:
  - clarify that an employer can use a bias audit commissioned by a vendor and based on historic vendor data to meet the AI law's requirements
  - define the term "independent auditor" to mean any "person or group that is not involved in using or developing an AEDT"
  - set forth minimum required elements for a bias audit
  - still present many ambiguities and unanswered questions
- A public hearing was held on October 24, 2022

Other US Regulations

- **Illinois** (January 2020) law imposes transparency, consent, and data-destruction duties on employers using AI video interviews to screen applicants
- **Maryland** (October 2020) law prohibits employers from using a facial-recognition service for the purpose of creating a facial template during an applicant's interview unless an applicant consents
- Many states have pending legislation, including **California, New Jersey, New York, Washington State, and Washington, DC**
  - Regulations proposed by the California Civil Rights Council would prohibit employers from using an AI tool that has "a disparate impact or constitutes disparate treatment" unless the AI tool is shown to be job-related for the position in question and is consistent with business necessity

EEOC Enforcement

- Under the Biden administration, the EEOC is stepping up its enforcement efforts in the areas of AI and machine-learning–driven hiring tools
- The EEOC recently announced that it is launching an initiative to ensure that AI and other emerging tools used in employment decisions comply with federal civil rights laws
- On May 12, the EEOC and DOJ issued separate guidance documents on the application of the ADA to AI tools in employment
  - Key takeaway: The EEOC expects employers to provide robust notice to applicants about AI tools and clearly advertise the availability of reasonable accommodations. This may create challenges, given that the objective of AI systems is to streamline the employment processes.
- On October 31, the General Counsel of the National Labor Relations Board issued a memo announcing her focus on electronic monitoring and AI, including that she will advocate for a new legal framework to protect workers' rights from such workplace technology

Pre-Hire Screening

- Federal Regulatory Requirements
- Ban-the-Box
- The Fair Credit Reporting Act
- Fair Chance Laws
- Credit Check Laws
- Contingent Worker Screening

Federal Regulatory Requirements

- A number of federal regulators prescribe criminal background check and/or credit check requirements on firms operating in the financial services industry. These regulators or self-regulatory organizations include:
  - The Securities and Exchange Commission
  - The Federal Trade Commission
  - The Federal Deposit Insurance Corporation
- Important considerations:
  - Federal requirements will preempt local requirements, but often *only* to the extent that they conflict with local requirements.
  - Federal requirements are often position-specific, as opposed to employer-specific.
  - Distinguish an obligation to disclose criminal history information (e.g., Form ADV) from obligations to disqualify based on criminal history.

Ban-the-Box Laws

APPLICATION FOR EMPLOYMENT

Q1) Have you ever been convicted of or plead guilty to a criminal offense?

☐ YES

☐ NO

☑ NONE OF YOUR BUSINESS

The Fair Credit Reporting Act (FCRA)

- The FCRA regulates background checks obtained from third-party consumer reporting agencies.
- The law imposes requirements on employers:
  - Before they obtain a "consumer report," which is defined to include a background check;
  - Before they take any adverse action based on the consumer report; AND
  - At the time they decide to take an adverse action based on the report.

Fair Chance Laws

- Is a criminal conduct exclusion job-related?
  - What is the nature and gravity of the offense?
  - How much time has passed since the offense?
  - What is the nature of the job sought?
- Are there relevant individual factors?
  - Rehabilitation, bonding, post-conviction work history, etc.?

NYS Requirements: Article 23-A

- Prohibits an employer from basing an adverse employment action on an individual's criminal history unless:
  1. there is a **direct relationship** between the criminal offense and the position sought/held by the individual; or
  2. hiring the individual or continuing his or her employment would involve an **unreasonable risk** to property or to the safety of specific individuals or the general public.
- The NYS Human Rights Law (NYSHRL) has incorporated Article 23-A's requirements, such that a violation of Article 23-A qualifies as "an unlawful discriminatory practice."
- The NYSHRL also prohibits requesting and/or basing an adverse employment action on a record of an arrest that was resolved in the person's favor, youthful offender adjudications, sealed cases, and cases adjourned in contemplation of dismissal (ACDs).
- NYSHRL applies not only to applicants and current employees but also to independent contractors.

NY City Requirements: NYC Fair Chance Act

- The Fair Chance Act:
  - Prohibits employers from requesting criminal information or conducting a background check until after extending a **conditional offer of employment**;
  - Prohibits making ***any*** reference to ***any*** background check requirement in ***any*** pre-hire materials;
  - Requires that employers document their Article 23-A analysis and provide it to candidates in a "fair chance form" before making a final decision; and
  - Requires leaving the position open for a minimum of five business days while the candidate reviews the form.

NYC Fair Chance Act Exemptions

Are there exemptions to the FCA, including its conditional offer requirements?

- Yes, **if** the employer is **required by law** or regulation (including a rule issued by a self-regulatory organization) to conduct a background check or if the employer is prohibited from hiring someone convicted of a particular crime (e.g., a "crime of dishonesty").
- Exceptions are **position-specific**, and the NYCCHR has stated that it will not assume that an entire employer or industry is exempt; rather, it will investigate how an exemption applies to a particular position or role.
- Exceptions are **narrowly construed**: even if a position is covered by an exception, an employer must still comply with any FCA requirements that do not conflict with another law, regulation, or SRO rule.
- Prohibitions on referencing to a "background check" in application materials still apply even if the position is exempt.

Credit Check Laws

A number of jurisdictions have enacted credit check laws that prohibit employers from requesting or considering "credit history" during the hiring process, unless credit history is "substantially related" to the role.

Key Takeaways:

- These laws and their definitions vary by jurisdiction.
- Credit history includes information beyond what is included in a "credit report" and can encompass liens, bankruptcies, and civil judgment information obtained from a background check provider.
- While a number of these laws contain exemptions applicable to financial institutions, many of them also require providing candidates notice with the reason underlying the request for credit history.
- NYC has the strictest credit check law in the country and largely limits credit checking to candidates where a credit check is required by law (e.g., loan originators).

Pre-Engagement Screening for Contingent Staff

Key Takeaways:

- Must consider whether contingent staff is providing services that render them covered by any federal regulatory requirements (e.g., Section 19, "associated persons" of a broker-dealer).
- For covered contingent workers, review Personnel Suitability Requirements in MSAs and Services Agreements to ensure that you have the discretion to perform the screens required by applicable laws.
- Consider applicable employment laws when performing those reviews (e.g., NYC Fair Chance Act, SCDEA).
- Given how litigious the background check area has become, review MSAs and Service Agreements to assess scope of indemnification provisions for lawsuits filed by contingent staff rejected because of a background check and consider implementing mandatory arbitration programs.

Miscellaneous Hot Topics

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Post-COVID Issues

- **Post-COVID Claims:**
  - **Accommodations:** Employees who were separated for not complying with vaccine mandates are bringing claims, largely alleging religious or disability discrimination.
    - Cases often arise after an individual's accommodation request was denied.
    - The firm is handling more than 250 of these matters right now.
  - **Harassment:** As employees return to the workplace following COVID restrictions, there is a risk of claims of harassment as a result of a general lack of social interaction and a need to reacclimate to in-person work.
  - **Whistleblower:** Some states, including NY, expanded whistleblower protection to allow individuals to raise claims of generally unsafe conditions or any action that they believe to be unlawful.
  - **Post-COVID Expense Reimbursements (CA):** There is a new wave of employee class actions seeking reimbursements for expenses accrued while employees worked remotely during the pandemic (phone, internet, electricity) under Cal. Lab. Code § 2802, which is drafted very broadly.

Miscellaneous Hot Topics

- **Generational Diversity:**
  - Generational diversity is the concept of having a wide range of generations in the workforce. While there are benefits to generational diversity, a focus on hiring and retaining younger workers can trigger claims under federal and state anti-discrimination laws.
  - EEOC filed multiple cases in 2022 based on use of "early talent/generational diversity" terminology.
- **Off-Duty Conduct:**
  - Increasing effort to regulate off-duty conduct that impacts the employer's business or reputation … and subsequent litigation
    - Central Park dog walker calling the police on an "African-American man."
    - Bank manager saying someone should take a bus and plow through a crowd of demonstrators after the shooting death of a Black teenager.
- **NLRA:**
  - Significantly increased union activism/coordination efforts, which can lead to complications for companies that are not accustomed to responding to NLRA/union issues.

Miscellaneous Hot Topics

- **Privacy:**
  - The CA CPRA (effective Jan. 1, 2023) became the first data protection law to apply to HR data. The law applies to for-profit businesses doing business in California and collecting personal information of state residents that meet certain size thresholds. Importantly, the CPRA gives employees the right to delete, correct, and request copies of specific pieces of information.
- **ESG:**
  - Increased regulation of ESG seems likely as US regulators have started to formalize diversity and inclusion reporting standards.
  - In August 2021, the SEC approved Nasdaq Stock Market LLC's rule changes related to board diversity and disclosure, that require each Nasdaq-listed company (subject to certain exceptions) to have at least two diverse board members, or to explain why it does not.

Miscellaneous Hot Topics

- **Manual Laborers**: There has been an uptick in cases alleging violations of N.Y. Lab. Law § 191, claiming that employees should have been classified as "manual workers," defined as individuals who spend more than 25% of their time engaged in "physical labor." Given the low threshold, there is a risk that bank tellers and other employees at financial services firms may begin alleging similar class claims. Manual workers are required to be paid weekly, and therefore potential damages include liquidated damages equal to 100% of late pay.
- **Outside Sales Exemption**: There is a risk of claims of FLSA and/or equivalent state-law violations brought by employees classified under the outside sales exemption such as business bankers, alleging entitlement to overtime pay for time spent working from home during the pandemic.

Miscellaneous Hot Topics

- **Trainee Overtime Pay**: There is a new trend of claims that trainees should be eligible for overtime pay, rather than paid a salary, and treated as exempt. The argument is based on the concept that during their "working time" and/or while studying for the Series 7, trainees are not exercising independent judgment/discretion and may work long hours.
- **Limits on NDAs**: Late yesterday, President Biden signed the Speak Out Act, which limits the enforcement of nondisclosure and nondisparagement agreements in certain sexual harassment/assault scenarios. It prohibits the enforcement of these agreements where a sexual harassment/assault dispute in the workplace arose after the agreements were previously signed.
- **Proposed Just Cause Bill in NYC Council**

THANK YOU