Applicant Tracking Trends & Compliance

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Applicant Tracking: Seyfarth’s Perspective

- Informed by experiences of more than 300 employment attorneys nationwide: 10 offices in the US
- Handling some of the largest employment discrimination cases today
- Leaders in understanding and comparing applicant tracking systems that assist human resources and affirmative action
- Has served as consulting counsel to companies who are your applicant tracking systems providers
- Defending hundreds of OFCCP compliance evaluations with applicant tracking issues in every region
- Consulting with hundreds of employers about applicant tracking compliance and best practices
OFCCP Audits Still Focus on Hiring

• Most settlements are hiring cases- Why?
  ► OFCCP gets more bang for its compliance effort
• Hiring remedies are more expensive than promotion, termination or even pay equity remedies
• OFCCP’s insistence on spreading settlement to all “affected class” members instead of only to the shortfall means that a greater number of persons receive a settlement
• Most applicant tracking systems are not up to the task of adequately describing why persons were screened out
Applicant Tracking Issues, So Many Issues!

- Flawed ATS implementation
- Inconsistent requisition drafting
- Steering
- Missing applicants
- Too many applicants
- Useless disposition coding
- Not saving searches
- Interview notes missing
- Others better qualified than hire
- New veterans & disability regulations
- New audit scheduling letter requests for data
Applicant Tracking System (ATS) Implementation Flawed

• Most ATS vendors do not include an OFCCP compliance-knowledgeable person on the implementation team
• Implementation team often limited to Talent Acquisition and IT
• Often affirmative action compliance professionals are not invited to participate in implementation
• If counsel is involved, generally it is in-house counsel not knowledgeable in OFCCP compliance issues
• Even if invited, may be difficult to persuade stakeholders that OFCCP compliance issues are important, especially if global implementation
Sources of Candidates - Candidates Seek You

• Best Practice: Send all to your website
  • Apply on Website

• Referred by Employment Service Delivery System
  • Must post almost all jobs, even conversions
  • Use vendor but still responsible for compliance
  • Many states do not accept electronic delivery

• Employee Referrals
  ► executive referrals

• Paper applications?
Some Sourcing Flows Escape the ATS

• Especially When
  ► You seek candidates
  ► Candidates supplied by others

• Key Compliance Issues
  ► No applicant flow
  ► Saving searches
  ► Avoiding steering
ATS Gap- You Seek Candidates Face-to-Face

• Job Fairs, Events
• College Recruiting
• Interns
ATS Gap - You Seek Candidates On-line

• Use of Job Boards (Monster, etc.)
  ► Difficult to save searches on some third party job boards

• Use of LinkedIn, Google, etc.
  ► Social media policy
  ► Privacy issues

• Contact Management Database
  ► Contact management systems often end-run ATS
    • no tracking of screening
    • recruiters steer candidates to particular requisitions
Use of Social Media to Attract and Screen Potential Employees

• 92% of companies currently use, or plan to recruit through, social media sites
• 46% of companies plan to invest more in recruiting through social networks
• 58% of companies have successfully hired applicants through a social networking site
• 31% of candidates disclose their social networking presence when applying for a job

Source: JobVite Social Recruitment Survey
Use of Social Media to Attract and Screen Potential Employees

• Benefits

► Cost-effective means for reaching potential candidates
► Fill vacancies faster
► Reach “passive” candidates
► Candidates can showcase qualifications and interest in job field
► Access to invaluable information you may not get otherwise
► Far easier to avoid a bad hire than get rid of one
Use of Social Media to Attract and Screen Potential Employees

- Risks Specific to Recruiting
  - Misinformation and inaccuracies
  - Off-duty conduct protected
    - state law protection of off-duty conduct – approximately 26 states
  - Treatment of personal identifying information
  - Data privacy laws – local, national, and global
Does a person’s online contact with employer (or vice versa) render the process subject to the internet applicant rules?

- If so, must:
  - include on applicant flow log with other applicant flow data
  - include in adverse impact analyses
  - maintain search records (position, criteria, date, resumes and related documents)

- Internet Applicant Rule- effective Feb. 2006 – already outdated; did not contemplate social networking
  - they expressed interest by coming to the company page
  - you considered them for a particular position
  - you considered whether or not they had the basic qualifications for the position
  - individual does not withdraw from the process
Risks of Maintaining Profiles in Contact Management System

• CMS should be used only for developing relationships; NOT for screening candidates
• Often profiles & resumes will be kept in the CMS
• CMS is searchable; searching qualifications for a particular job is risky – internet applicant may attach
Risks of Maintaining Profiles in Contact Management System

• Recruiters will want to contact CMS entries with information about a particular position…risky!

• Keep information about openings limited to encouragement to visit website to find jobs of a general type;
  ► Avoid providing information in social media about a particular position, a requisition number or a link to the requisition of a particular position

• If you search the CMS for a particular position,
  ► you are governed by the Internet Applicant recordkeeping requirements and you must save the search (also the position searched for, date of search and criteria used in search)

• Using the CMS to find talent and then preferring them once they apply will be further evidence that the CMS is really just another ATS
ATS Gap - Applicants Supplied by Others

• Conversion/ Hiring of Temporary Workers
  ► Capture pool of workers in same job
  ► Enter into ATS

• Search Firms - Retained & Contingent
  ► Include requirement to administer self-identification process & maintain applicant flow in contract with staffing company
  ► Provide standard spreadsheet to all staffing firms
  ► Or require firms to use your ATS
  ► Firm may resist listing candidates’ names - use coding
Screening With Assistance of Third Parties

• Must comply with the FCRA if using a third-party

• New businesses conduct social media searches and remove sensitive demographic and other information
  ▶ screen for drug references, violence, gang activity, racism, etc.

• Complete outsourcing of recruiting activity
  ▶ Contractor still responsible for compliance
  ▶ Must ensure 3d party understands and complies with OFCCP regulations
  ▶ And will be fully responsive during an audit
Common Requisition Practices Muck Up Applicant Flow

- Requisition should identify basic and preferred qualifications
- Multiple jobs in a single req- OK if same job
  - but common to use recent pool for new opening
- Dummy or gathering reqs often lead to missing applicants
- Evergreen reqs often prevent identification of discrete pool
  - avoid keeping reqs open indefinitely
- Hire person not meeting qualifications stated in requisition causing mismatch
  - Close original requisition & repost?
Too Many Applicants!

• Basic qualification screens often fail to reduce the pool
  ► Especially in entry level jobs

• Data Management Techniques
  ► Must be applied *AFTER* qualification screens
  ► Must be consistent for the requisition
  ► Should be documented in ATS or on requisition
  ► If chronological, are we missing ESDS referrals
  ► If pool includes candidates from recruiter’s internal database search AND new candidates, and using chronological DMT
  ► What if mixed pool of internals and external candidates- use just for externals?
Too Many Applicants!

• Automated screening questions
  ► Disqualification: eligible to work in US, legal age, etc
  ► Basic qualifications
    • Must be defined FOR EACH JOB
    • *Griggs v. Duke Power* - must be job-related
  ► Other or Preferred Qualifications
    • Used for ranking applicants
    • OK to rank AFTER basic qualifications screen and disposition coding for “does not meet basic qualifications” is competed
Yikes! What If Other Applicants Better Qualified?

- Employer retention policy: priority given to internal applicants
- Executive referral
- Executive’s child
- Renegade hiring manager
- H1B

► Two or more applicant flows
► But some never considered
► Considered by whom? Recruiter yes, hiring manager no
Disposition Code Nightmares

• Not sufficient to capture distinction between applicants and non-applicants
  ▶ expressed interest
  ▶ considered for a particular position
  ▶ has the basic qualifications for the position
  ▶ did not withdraw
Disposition Code Nightmares

• Too general to defend choices among applicants who have basic qualifications but are not best qualified
  ▶ consider more detailed disposition codes
    • not best qualified- experience
    • not best qualified- skills
    • not best qualified- education
  ▶ still must be able to look back at resume/application
  ▶ interview notes critical if resume/app review doesn’t support choice on its face
Interview Note Hell

- If take interview notes, must retain
  - If don’t take notes, how do you defend selections
  - Especially since time has passed between audit and when notes were taken
  - High recruiter turn over

- Most interview notes are not maintained to readily support audit inquiries about applicant screening
  - Notes must be easily retrievable in audit
  - Put in ATS comment field?
  - Refer to document number in document management system

- Refresher training for recruiters:
  - do’s & don’ts of interviewing
  - interactive process for applicants with disabilities
Issues When Changing ATS Vendors

- Can get data but it is a jumble
- ATS vendors consider reporting tools proprietary
- Very expensive to have reporting tool rebuilt
- Choose vendor carefully
- Include clause in contract regarding continuation of reporting tools after contract termination for 3 years or longer if pending audits
  
  ▶ New Section 503 and Section 4212 regulations may require some information to be kept up to 5 years
Upcoming Changes in Applicant Tracking Compliance

- Veterans & Disability Regulations
- Scheduling Letter
Some definitional changes in the Section 4212 NPRM will impact applicant tracking systems:

- VEVRAA becomes “Section 4212”
- Covered veteran becomes “protected veteran”
- Renames “other protected veteran” to “active duty wartime or campaign badge veteran”
  - Vets 100/100A categories not changed
Proposed Veterans and Disability Regulations – Pre-Offer Solicitation

• Section 503 & 4212 regulations will require changes in the pre-employment self-identification forms used by most contractors
  ► Are you a Protected Veteran?
    • OFCCP will provide model
    • List definitions: not all veterans are covered
  ► Are you an Individual with a Disability?
    • OFCCP model
    • Will discuss pros & cons of asking to specify if need an accommodation
Self Identification Under Proposed Veterans and Disability Regulations

• Need to track referrals from ESDS and other vets and disability targeted sources of applicants
  ► How were you referred for employment
    • Best practices: Drop down list of referral sources and make referral source question mandatory
    • Difficult to sort & report on written entries

• Are you a “priority referral” veteran?
  ► Qualified veterans will receive priority referral to services over non-veterans as determined by each program's mandatory eligibility criteria.
Proposed Veterans and Disability Regulations: ESDS Referrals

• Regulation requiring posting with ESDS does not specify that referrals need to be considered

• Current state: ESDS referrals often not truly considered
  ► Too late! Job filled by time referral occurs

• Future state:
  ► will need to evaluate
  ► must report on them
  ► compare vets and persons with disabilities with total referrals
  ► likely need to justify low ratios
  ► likely used as a benchmark to compare applicant ratios and hiring ratios
Proposed Veterans and Disability Regulations: Post-Offer Self-Identification

- Does data belong in ATS or HRIS?
  - administer immediately after offer or at orientation
- Type of Veteran- format specified by OFCCP
- Consider asking date of separation from military
  - recently separated veteran lose protected status 3 years after discharge
  - ATS or HRIS will need to compute
- Should you request information about reasonable accommodation now?
  - Section 4212 regulations may require that contractors proactively approach anyone who self-identifies as a disabled veteran
  - Does this start time clock? (5-10 days!)
Proposed Veterans and Disability Regulations: Job Fills and Job Fill Ratio

- Will need to modify ATS to report on:
  - number of requisitions
  - number of requisitions filled and
  - percentage

- Be sure to exclude requisitions closed & never filled
  - Should not be interpreted as open requisitions
  - Best practice: conduct self audits of cancelled requisitions
Scheduling Letter: Internal Applicant Pools

- Internal applicant pools must be tracked as OFCCP releases the revised Scheduling Letter
- For competitive promotions, best practice: capture in ATS
  - If internals receive priority, be sure to limit applicant pool to only those truly considered
  - Types of priority: preference or considered first
- OFCCP not clear about expectation for non-competitive pools
  - Reality: 1:1
  - OFCCP may expect job group or job title incumbents
Scheduling Letter: Contract, per diem or day labor & temporary applicants

• New Item 12. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1st (i.e., the data as it existed on the most recent February 1st date)

• Clear definition that AAP must include contract, per diem, day labor & temporary employees
  ► Employee and applicant tracking

• Many ATS are not tracking
  ► large volume of applicants
  ► alternative screening processes
Questions?

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Thank you!