

## 1.2: The Law and Recruitment

### Learning Objectives

1. Explain the Immigration Reform and Control Act (IRCA), Patriot Act, and equal employment opportunity (EEO) laws and how they relate to recruiting.

One of the most important parts of HRM is to know and apply the law in all activities the HR department handles. Specifically with hiring processes, the law is very clear on a fair hiring that is inclusive to all individuals applying for a job. The laws discussed here are applied specifically to the recruiting of new employees.

### Immigration Reform and Control Act

The Immigration Reform and Control Act (IRCA) was adopted by Congress in 1986<sup>1</sup>. This law requires employers to attest to their employees' immigration status. It also makes it illegal to hire or recruit illegal immigrants. The purpose of this law is to preserve jobs for those who have legal documentation to work in the United States. The implications for human resources lie in the recruitment process, because before entering employees into the selection process (interviewing, for example), it is important to know they are eligible to work in the United States. This is why many application forms ask, "Are you legally able to work in the United States?" Dealing with the IRCA is a balancing act, however, because organizations cannot discriminate against legal aliens seeking work in the United States.

The IRCA relates not only to workers you hire but also to subcontractors. In a subcontractor situation (e.g., your organization hires an outside firm to clean the building after hours), your organization can still be held liable if it is determined your organization exercises control over how and when the subcontractors perform their jobs. In 2005, undocumented janitorial workers sued Walmart, arguing that the contracting company they worked for didn't pay them a minimum wage<sup>2</sup>. Because the retailer controlled many of the details of their work, Walmart was considered to be a coemployer, and as a result, Walmart was held responsible not only for back wages but for the fact their subcontractor had hired undocumented workers.

HR professionals must verify both the identity and employment eligibility of all employees, even if they are temporary employees. The INS I-9 form (Employment Eligibility Verification form) is the reporting form that determines the identity and legal work status of a worker.

If an audit is performed on your company, you would be required to show I-9 forms for all your workers. If an employer hires temporary workers, it is important to manage data on when work visas are to expire, to ensure compliance. Organizations that hire illegal workers can be penalized \$100 to \$1,000 per hire. There is a software solution for management of this process, such as HR Data Manager. Once all data about workers are inputted, the manager is sent reminders if work authorization visas are about to expire. Employers are required to have the employee fill out the I-9 form on their first day of work, and the second section must be filled out within three days after the first day of employment. The documentation must be kept on file three years after the date of hire or for one year after termination. Some states, though, require the I-9 form be kept on file for as long as the person is employed with the organization.

In 2010, new rules about the electronic storage of forms were developed. The US Department of Homeland Security said that employees can have these forms electronically signed and stored.

### Patriot Act

In response to the September 11, 2001, terrorist attacks against the United States, the Patriot Act was signed, introducing legislative changes to enhance the federal government's ability to conduct domestic and international investigations and surveillance activities. As a result, employers needed to implement new procedures to maintain employee privacy rights while also creating a system that allowed for release of information requested by the government.

The act also amended the Electronic Communications Privacy Act, allowing the federal government easier access to electronic communications. For example, only a search warrant is required for the government to access voice mail and e-mail messages.

The act also amended the Foreign Intelligence Surveillance Act. The government is allowed to view communications if an employee is suspected of terrorism, and the government does not have to reveal this surveillance to the employer.

It is prudent for HR professionals and managers to let potential employees know of these new requirements, before the hiring process begins.

### ? How Would You Handle This? - Wrong Job Description

Aimee, a highly motivated salesperson, has come to you with a complaint. She states that she had her performance evaluation, but all the items on her evaluation didn't relate to her actual job. In the past two years, she explains, her job has changed because of the increase of new business development using technology. How would you handle this?

## EEO Set of Laws

EEO laws are often discussed within HR classes, but they are worth mentioning again here in relation to the recruitment process. The Equal Employment Opportunity Commission (EEOC) is a federal agency charged with the task of enforcing federal employment discrimination laws. While there are restrictions on the type of company covered (companies with at least fifteen employees), the EEOC requires collection of data and investigates discrimination claims, again, for organizations with more than fifteen employees.

Under EEO law related to the recruitment process, employers cannot discriminate based on age (forty years or older), disability, genetic information, national origin, sex, pregnancy, race, and religion. In a job announcement, organizations usually have an EEO statement. Here are some examples:

1. (Company name) is fully committed to Equal Employment Opportunity and to attracting, retaining, developing, and promoting the most qualified employees without regard to their race, gender, color, religion, sexual orientation, national origin, age, physical or mental disability, citizenship status, veteran status, or any other characteristic prohibited by state or local law. We are dedicated to providing a work environment free from discrimination and harassment, and where employees are treated with respect and dignity.
2. (Company name) does not unlawfully discriminate on the basis of race, color, religion, national origin, age, height, weight, marital status, familial status, handicap/disability, sexual orientation, or veteran status in employment or the provision of services, and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford individuals with disabilities an equal opportunity to participate in all programs and activities.
3. It is the policy of (college name), in full accordance with the law, not to discriminate in employment, student admissions, and student services on the basis of race, color, religion, age, political affiliation or belief, sex, national origin, ancestry, disability, place of birth, general education development certification (GED), marital status, sexual orientation, gender identity or expression, veteran status, or any other legally protected classification. (College name) recognizes its responsibility to promote the principles of equal opportunity for employment, student admissions, and student services taking active steps to recruit minorities and women.
4. (Company name) will not discriminate against or harass any employee or applicant for employment on the basis of race, color, creed, religion, national origin, sex, sexual orientation, disability, age, marital status, or status with regard to public assistance. (Company name) will take affirmative action to ensure that all practices are free of such discrimination. Such employment practices include, but are not limited to, the following: hiring, upgrading, demotion, transfer, recruitment or recruitment advertising, selection, layoff, disciplinary action, termination, rates of pay or other forms of compensation, and selection for training.

In addition to including the EEO policy in the job announcement, HR is required to post notices of EEOC policies in a visible part of the work environment (such as the break room).

Although the EEOC laws in hiring are clear about discrimination, an exception may occur, called the bona fide occupational qualification (BFOQ). BFOQ is a quality or attribute that is reasonably necessary to the normal operation of the business and that can be used when considering applicants. To obtain a BFOQ exception, a company must prove that a particular person could not perform the job duties because of sex, age, religion, disability, and national origin. Examples of BFOQ exceptions might include the following:

1. A private religious school may require a faculty member to be of the same denomination.
2. Mandatory retirement is required for airline pilots at a certain age.
3. A clothing store that sells male clothing is allowed to hire only male models.
4. If an essence of a restaurant relies on one sex versus another (e.g., Hooters), they may not be required to hire male servers.

However, many arguments for BFOQ would not be considered valid. For example, race has never been a BFOQ, nor has customers' having a preference for a particular gender. Generally speaking, when going through the recruitment process and writing job descriptions, assuming a BFOQ would apply might be a mistake. Seeking legal council before writing a job description would be prudent.

Other aspects to consider in the development of the job description are disparate impact and disparate treatment. These are the two ways to classify employment discrimination cases. Disparate impact occurs when an organization discriminates through the use of a process, affecting a protected group as a whole, rather than consciously intending to discriminate. Some examples of disparate impact might include the following:

1. Requirement of a high school diploma, which may not be important to employment, could discriminate against racial groups
2. A height requirement, which could limit the ability of women or persons of certain races to apply for the position
3. Written tests that do not relate directly to the job
4. Awarding of pay raises on the basis of, say, fewer than five years of experience, which could discriminate against people older than forty

Disparate treatment, when one person is intentionally treated differently than another, does not necessarily impact the larger protected group as a whole, as in disparate impact. The challenge in these cases is to determine if someone was treated differently because of their race or gender or if there was another reason for the different treatment. Here are two examples:

1. Both a male and a female miss work, and the female is fired but the male is not.
2. A company does not hire people of a certain race or gender, without a BFOQ.

### ? Human Resource Recall

Can you think of other examples of disparate impact that might affect a certain protected group of people under EEOC?

### The Concept of Disparate Impact



- JM Gordon explains the concept of disparate impact.

### 📌 Key Takeaways

- *IRCA* stands for *Immigration and Reform Act*. This law requires all employers to determine eligibility of an employee to work in the United States. The reporting form is called an I-9 and must be completed and kept on file (paper or electronic) for at least three years, but some states require this documentation to be kept on file for the duration of the employee's period of employment.
- The *Patriot Act* allows the government access to data that would normally be considered private—for example, an employee's records and work voice mails and e-mails (without the company's consent). The HR professional might consider letting employees know of the compliance with this law.
- The *EEOC* is a federal agency charged with ensuring discrimination does not occur in the workplace. They oversee the equal employment opportunity (EEO) set of laws. Organizations must post EEO laws in a visible location at their workplace and also include them on job announcements.

- Related to the EEOC, the *bona fide occupational qualification (BFOQ)* makes it legal to discriminate in hiring based on special circumstances—for example, requiring the retirement of airline pilots at a certain age due to safety concerns.
- *Disparate impact* refers to a policy that may limit a protected EEO group from receiving fair treatment. Disparate impact might include a test or requirement that negatively impacts someone based on protected group status. An example is requiring a high school diploma, which may not directly impact the job. *Disparate treatment* refers to discrimination against an individual, such as the hiring of one person over another based on race or gender.

### ? Exercises 1.2.1

1. Describe the difference between disparate treatment and disparate impact.
2. Explain a situation (other than the ones described in this section) in which a BFOQ might be appropriate. Then research to see if in the past this reasoning has been accepted as a BFOQ.

<sup>1</sup>U.S. Citizenship and Immigration Services website. Accessed January 17, 2011. [www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextoid=04a295c4f635f010VgnVCM1000000ecd190aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextoid=04a295c4f635f010VgnVCM1000000ecd190aRCRD).

<sup>2</sup>Zavala v. Wal-Mart, No. 03-5309, DC NJ (2005).

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