

# Managing Employee Assets: HR Strategies for the Entire Employment Lifecycle

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In today's complex regulatory environment, businesses encounter numerous legal challenges in hiring and in connection with employment agreements. From non-compete clauses to background checks and worker classification issues (to name just a few such contexts), employers must balance protecting their interests with adhering to federal, state and local laws.

This article delves into key hiring challenges and best practices, featuring insights from employment law professionals.

## The Changing Landscape of Non-Compete Agreements

Employment agreements, especially those involving non-compete and non-solicitation clauses, have faced increasing scrutiny. States across the US, as well as federal agencies like the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB), are moving toward stricter regulations on these restrictive covenants.

[Amit Bindra](#), a partner at the Prinz Law Firm, highlights that various states have enacted laws limiting the use of non-competes, initially for low-wage workers, and then expanding these laws to apply to more employees. For instance, Illinois passed the Freedom to Work Act, which banned non-competes for workers earning close to minimum wage. A few years later, Illinois amended its law to set a salary threshold for non-competes and non-solicits, while including other provisions in the amendment to tighten enforcement. After setting salary thresholds, some states attempted to ban most non-competes. Minnesota successfully passed such a law. Other state legislatures also passed such a ban (for example, New York), but governors vetoed a ban.

In May 2024, the FTC issued a final rule prohibiting most non-compete agreements, citing their negative impact on competition and worker mobility. The rule defines a non-compete clause as a term that prevents a worker from seeking or accepting employment or operating a business after the conclusion of their current employment. Employers are required to rescind existing non-compete clauses and notify employees of the change.

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However, legal challenges have arisen regarding the FTC's authority to implement this rule. In August 2024, a federal judge in Texas issued a nationwide injunction blocking the rule, stating that the FTC lacks the statutory authority to promulgate such a regulation.

The NLRB has also stepped into the fray. The NLRB's General Counsel issued two memorandums regarding the intersection of restrictive covenants and the National Labor Relations Act, and one administrative law judge determined certain covenants were too broad.

Given these developments, Bindra suggests that "the legal people and the business people should always talk" to find alternative or creative ways to protect legitimate business interests beyond boilerplate non-compete agreements.

### **What Employers Should Do:**

- **Review Existing Agreements:** Ensure non-compete clauses comply with current state and federal laws.
- **Consider Alternatives:** [Non-disclosure agreements \(NDAs\)](#) or trade secret protections might better serve business interests.
- **Stay Informed:** Keep abreast of ongoing legal developments regarding non-compete clauses.

### **Background Checks and Compliance: Avoiding Pitfalls**

Conducting thorough background checks is essential but comes with legal challenges. Employers must comply with laws such as the Fair Credit Reporting Act (FCRA) and state-level 'ban-the-box' laws, which regulate when and how an employer can inquire about a candidate's criminal history.

[Helen Bloch](#), founder of the Law Offices of Helen Bloch P.C., emphasizes the importance of timing in background checks. "You can't ask that person about criminal convictions in general until you are ready to actually make a job offer," she explains, and "the criminal conviction history that is permitted by law to investigate would then need to be relevant for the job at issue. So, for instance, in a daycare situation, criminal conviction history is definitely going to be relevant."

### **Key Steps for Employers:**

1. **Timing Matters:** Ask about criminal convictions only after extending a conditional job offer.
2. **Consent is Critical:** Obtain written permission before conducting background checks.
3. **Provide Notice and Opportunity to Respond:** If adverse action is taken based on a background report, applicants must be given an opportunity to contest inaccuracies.

Failing to adhere to these requirements can expose businesses to significant legal liabilities, including class-action lawsuits.

### **Classification Challenges: Employees vs Independent Contractors**

[Misclassification of workers as independent contractors instead of employees](#) remains a major compliance challenge. Employers often misclassify to avoid paying benefits, payroll taxes, and overtime—actions that can result in severe financial penalties if discovered.

According to Bindra, "If a company gets it wrong, it could lead to collective actions, audits by state

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and federal labor departments and costly litigation.” Employers should determine classification based on the level of control they exert over the worker and the nature of the work performed.

### Considerations When Classifying Workers:

- **Control Over Work:** Does the worker control their schedule and methods?
- **Provision of Equipment:** Is the worker using their own equipment?
- **Integration into Business:** Is the work integral to the company’s core business?

Employers are encouraged to err on the side of caution when classifying individuals to avoid ambiguity in wage and hour disputes.

## Exempt vs Non-Exempt Employees: Wage and Hour Compliance

Determining whether a worker is exempt or non-exempt from overtime pay under the federal Fair Labor Standards Act (FLSA) is crucial. Some positions, such as executive, administrative, and professional roles, may qualify for overtime exemptions, but employers must ensure they meet the specific criteria outlined by the U.S. Department of Labor. [Max Barack](#), partner at the Garfinkel Group, notes that “the title is not what matters” when it comes to exemption status — it’s about job duties, salary levels, and the degree of independence.

### Best Practices to Avoid Wage and Hour Pitfalls:

- **Conduct Regular Audits:** Regularly review employee classifications.
- **Accurate Job Descriptions:** Ensure job descriptions accurately reflect exempt duties.
- **Meticulous Time Tracking:** Track work hours meticulously to avoid unpaid overtime claims

## The Growing Role of Social Media and AI in Hiring

Social media has become a valuable tool in recruiting and screening candidates, but it also presents risks if not used appropriately. Employers should avoid requesting social media passwords or attempting to access private profiles, as many states have laws prohibiting such practices. According to Helen Bloch, “employers need to be cautious about how they use social media to evaluate candidates to avoid potential discrimination claims.”

Artificial intelligence (AI) is increasingly used in hiring processes, yet it can unintentionally introduce biases. AI screening tools may disproportionately exclude certain demographic groups if they are not carefully designed and monitored. The [Equal Employment Opportunity Commission \(EEOC\) has issued guidance](#) emphasizing that the use of AI in hiring must comply with anti-discrimination laws. States such as Illinois have also enacted [legislation requiring transparency and fairness in AI-driven hiring decisions](#).

### How To Mitigate AI Hiring Risks:

- Ensure AI algorithms are regularly audited for potential biases.
- Disclose the use of AI in hiring decisions and obtain applicant consent.
- Regularly review hiring criteria to ensure compliance with anti-discrimination laws.
- Train HR personnel to interpret AI-generated recommendations with a critical eye.

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## Addressing Salary History Bans and Pay Transparency Laws

Many states and local jurisdictions have enacted laws prohibiting employers from inquiring about a candidate's salary history to promote pay equity. As Amit Bindra points out, employers must be mindful of these laws to avoid discrimination claims.

Instead of asking about past compensation, employers should focus on salary expectations and provide transparent salary ranges in job postings. This approach aligns with [recent pay transparency laws in states like Illinois and Colorado](#), which require employers to disclose pay ranges upfront.

### Best Practices for Compliance:

- Remove salary history questions from job applications and interviews.
- Clearly communicate salary ranges and benefits in job postings.
- Train hiring managers to focus on qualifications and salary expectations.

### Key Takeaways for Employers

[Charles Krugel](#), another seasoned labor and employment attorney, emphasizes that “taking a proactive approach and staying compliant with the ever-changing employment laws is crucial to avoiding costly disputes and protecting business interests.” In light of these challenges, employers must stay proactive in their hiring practices by:

1. **Regularly Updating Employment Agreements:** Ensure compliance with the latest federal and state regulations regarding restrictive covenants and wage requirements.
2. **Establishing Consistent Hiring Policies:** From job postings to interviews, maintain uniform processes to avoid discrimination claims.
3. **Conducting Thorough Due Diligence:** Vet third-party background check providers and payroll services to ensure compliance.
4. **Staying Informed on Changing Laws:** Employment regulations are dynamic, and businesses must continuously adapt to avoid costly legal consequences.
5. **Balancing Business Needs with Legal Compliance:** Engage with legal counsel to ensure hiring strategies align with current regulations and best practices.

By understanding legal requirements and taking proactive measures, businesses can protect themselves from potential liabilities and ensure a smooth hiring process. Whether it's ensuring compliance with non-compete agreements, background checks, or pay transparency laws, staying ahead of the curve is key to long-term success.

To learn more about this topic view [Welcome to the Team! Recruiting & Hiring, Including Restrictive Covenants](#). The quoted remarks referenced in this article were made either during this webinar or shortly thereafter during post-webinar interviews with the panelists. Readers may also be interested to read other articles about [Contractor vs. Employee Classifications](#).

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