

Q. Employers are hiring third-party recruiters—such as employment agencies, search firms, and contract recruiters—in increasing numbers to do their on-campus recruitment. Many career services practitioners give third-party recruiters access to students. Both career services and employers are using online job search and resume referral services as part of their recruitment and career services programs. What are the legal and ethical issues that employers and career services staff should consider when working with third-party recruiters?



LEGAL Q & A

Reprinted from the Spring, 2004, *Journal*, with permission of the National Association of Colleges and Employers, copyright holder.

A. Generally, state law requires organizations or persons that operate employment agencies to obtain a license or register with a state office as a requisite for operating the business.

However, in some states, this requirement is imposed only on employment agencies that charge fees or enter into contractual arrangements with employers or job seekers. In other states, only nonprofit agencies, colleges, and universities are exempted from the licensing requirements, regardless of whether a fee is charged. Moreover, state laws define “employment agency” differently. Some definitions are broad—“any person or persons which procure employment, refer individuals for employment, or register persons seeking help in ascertaining where employment is available”—and may include online job boards and referral services. Other definitions are narrow—“the business of procuring and offering to procure employment”—and cover the more traditional concept of a private employment agency.

The regulated business practices and the penalties for noncompliance vary with each statute. Generally, the regulated business practices include nondiscriminatory referral methods, advertisement of bona fide job opportunities, imposition of contractual and financial obligations upon the job seekers or employers, record keeping, and bond posting. Penalties for violating these restrictions vary, ranging from loss of the business license to civil penalties and fines. Practitioners may contact their state licensing bureau to learn if a particular third-party entity is required to register and has obtained a license or registration.

Traditional third-party recruiters (employment agencies and contract recruiters) must also comply with the nondiscrimination requirements of the Age Discrimination in Employment Act, Title VII of the Civil

Rights Act of 1964, and the Americans With Disabilities Act (ADA). This means an employment agency may not refuse to refer an individual because of the person's race, color, sex, national origin, religion, age (older than 40), or disability. Moreover, the ADA requires employment agencies to make reasonable accommodations upon request for an individual with a disability to enable him or her to participate in the recruitment activities conducted by the agency.

While there is no case law or government regulations to date that addresses online job search sites and resume data bases, they also may be subject to the nondiscrimination requirements of the above civil rights laws. A job search web site is in the business of helping individuals who are seeking employment by making available job opportunities

on its site. A resume referral company is in the business of referring individuals for employment via Internet access to a data base or other means. Such companies may be included within the definition of "employment agency"—"any person regularly undertaking with or without compensation to procure employees for an employer or procure for employees opportunities to work for an employer and includes an agent of such a person"—found within these federal civil rights laws. To be sure, any online employment service should not permit employers to screen candidates based upon race, color, sex, national origin, disability, religion, or age. It would probably be wise for such services not to collect this type of data. Collecting such demographic data may be appropriate for the employer once the individual is part of its candidate

Self-Directed Career Planning Books for College Students and New Grads

The Very Quick Job Search, Third Edition

by Michael Farr

One of the best-selling career books ever published. Covers all essentials of job searching and career planning and includes proven, successful methods to help job seekers quickly get jobs.

ISBN 1-59357-007-4 • \$17.95

Best Resumes for College Students and New Grads

by Louise M. Kursmark

Includes resume samples for all degree levels, plus information on how to create and use electronic, web, and e-mail resumes; write cover letters; and manage a job search campaign.

ISBN 1-56370-900-7 • \$12.95

200 Best Jobs for College Graduates, Second Edition

by Michael Farr and LaVerne Ludden, Ed.D., with database work by Laurence Shankin, Ph.D.

Includes more than 200 information-packed job descriptions for college graduates. Covers all jobs in the Dept. of Labor's O*NET database that require an associate, bachelor's or advanced degree.

ISBN 1-56370-855-8 • \$16.95

How to Be Happy at Work, Second Edition

by Ariene S. Hirsch

Readers can find practical advice on how to choose or change careers, deal with job loss, balance work and personal life, achieve greater job security, and much more.

ISBN 1-56370-980-5 • \$14.95



Source Code:
ADJ

jist
Publishing

Call our inside sales department for more information on these and other great products from JIST, America's Career Publisher.

8902 Otis Avenue • Indianapolis, IN 46216 • 1.800.648.5478 • www.jist.com

pool as part of the employer's voluntary affirmative action self-identification form, but the employer should not be permitted access to this information if it is collected by the online job service.

Employers' Legal Obligations

An employer who hires a third-party recruiter has a number of obligations. Employers using employment agencies or search firms must remember that these entities are considered the employer's agents in the recruitment process. An employment agency's actions may be "imputed" to the employer using them. That means if a third-party recruiter mishandles the hiring process, the employer may be liable.

An example involves an employer who hired a polygraph consultant to perform lie-detector tests of applicants for screening purposes. (This was before the Employee Polygraph Protection Act made it illegal.) The consultant sexually harassed female applicants during the testing. The court held the consultant and the employer liable, because the consultant was acting on behalf of the employer in the recruitment process. This same logic applies to employment agencies.

Employers should insist on compliance by third-party organizations with Equal Employment Opportunity (EEO) standards and state employment laws as they apply to recruiting. In this regard, an employer should learn as much as possible about the recruiters' level of

knowledge and experience in accepted recruiting, interviewing, and screening practices before hiring an agency. If the employer becomes aware of a questionable practice, it should contact the agency immediately. If the agency is unwilling to modify or explain the practice, the employer should find another firm to assist in its recruitment process.

The employer will have other legal obligations to the third-party recruiter, including fees paid for placement and confidentiality of candidate information. A well-written contract should clearly spell out when an employer must pay a fee. Many times, for instance, if a new hire is discharged for cause within a month of initial employment, the employer may not have to pay the fees. However, if discharge is due to a layoff, the employer may still have to pay. Employers may want to include the agency's verification of applicant references and credentials, and ensure the accuracy of applicant records in their contracts with employment agencies.

Legal Obligations of Career Services

Career services practitioners, who sometimes seem more concerned about traditional third-party recruiters than employers, have less legal entanglement with them. No contractual ties exist between career services staff and third-party recruiters. The third-party recruiter does not act on behalf of anyone in the career services office. However, when it comes to online job search

and resume web sites, there may be some legal entanglements. Career services professionals use these services increasingly to provide students with job opportunities (job postings and interview scheduling) and resume data bases and referral services that the schools provided previously. By providing these services for the schools, the online vendors are agents of the school. Thus, the school should assure itself that the vendor is conducting its business in compliance with the EEO laws (similar to the responsibility of employers to ensure compliance with EEO laws by employment agencies that recruit on the employers' behalf).

In addition to EEO compliance, protection of the privacy of student information has to be a major concern of career services. The Family Educational Rights and Privacy Act (FERPA) requires schools to obtain a written release signed by a student before disclosing information to anyone outside of the educational institution, including a third-party recruiter. The law prohibits re-disclosure of student information without obtaining additional written consent from the student. Career service practitioners may simply modify student release forms to give traditional third-party recruiters permission to re-disclose student information to the employers they represent. The release form may be worded as broadly or narrowly as the career services practitioner deems appropriate, i.e., a particular third-party recruiter can be named or the specification can be a general category, such as the employment agency.

With an online service, not only should career services obtain consent from the student, but also the school should stipulate in its contract with the online service that the service will comply with FERPA when handling student information. Furthermore, the service should be prohibited from using the information



Rochelle Kaplan is NACE's general counsel. Employers and career services professionals with questions about this or other legal issues should write the NACE Legal Department, 62 Highland Ave., Bethlehem, PA 18017-9085, call 610/868-1421 or 800/544-5272, ext. 117; fax 610/868-0208; or e-mail rkaplan@naceweb.org.

in any way other than for purposes of providing students access to jobs and employers access to student information for recruiting and hiring.

However, if a student sends his or her resume, transcript, and reference letters directly to an employment agency or online service not connected with the school, then the career services office has no responsibility at all because the student—not the institution—is disclosing the information.

The career services office may want to place a notice on the information being disclosed to traditional third-party recruiters that if re-disclosure occurs without written student consent, the employment agency will lose its recruiting privileges and be required to return previously obtained information to the school. Some career services staff have third-party recruiters sign a memorandum stating they understand these requirements. Certainly, schools should include in their contracts with any online service providers a termination provision for wrongful use of student information.

Applying the NACE *Principles for Professional Conduct*

The NACE *Principles for Professional Conduct* (see www.nacweb.org/about/annotated.htm) includes guidance on the ethical obligations of employers, career services professionals, and third-party recruiters to each other. The *Principles* define third-party as:

“[A]gencies, organizations, or individuals recruiting candidates for temporary, part-time, or full-time employment opportunities other than for their own needs. This includes entities that refer or recruit for profit or not for profit, and it includes agencies that collect student information to be disclosed to

employers for purposes of recruitment and employment.”

While the third-party principles were created before the advent of the online job board and resume referral organizations, these principles apply to those virtual organizations as well as traditional third-party recruiters.

The critical language of the definition is “employment opportunities other than for their own needs.” By using this language, the NACE Principles for Professional Conduct Committee wanted to distinguish between organizations that hire individuals for their own organization, but might send these employees to perform work at other organizations, and organizations that do not hire for their own organization, but rather screen and select applicants for other employers to consider. Under the *Principles*, these organizations are temporary agencies:

“Temporary agencies are employers, not third-party recruiters, and will be expected to comply with the professional conduct principles set forth for employer professionals. These are organizations that contract to provide individuals qualified to perform specific tasks or complete specific projects for a client organization. Individuals perform work at the client organization, but are employed and paid by the agency.”

From an ethical standpoint, both third-party recruiters and temporary agencies have the same or similar obligations as an employer to follow professionally accepted recruiting practices and equal employment



opportunity standards, and refrain from disclosing information about a student without the student’s consent.

However, since third-party recruiters are not hiring for their work force, the *Principles* also require those organizations to have real employment opportunities for students and to tell the students the names of the employing organizations that the recruiter is representing (*Principle 5* for third-party recruiters). This principle’s foundation rests with two of the *Principles’* fundamental precepts, namely “informed and responsible decision making by candidates” and “open and free selection of employment opportunities in an atmosphere conducive to objective thought, where job candidates can choose optimum long-term uses of their talents that are consistent with personal objectives and all relevant facts.” In short, the candidate’s autonomy is at risk when he or she is denied the name of the employer,

which is necessary to make a job-related decision.

Besides a third party's ethical obligations to students, the *Principles* also include guidance on the ethical obligation of employers, career services professionals, and third-party recruiters to each other.

Principle 9 for employment professionals requires employers to verify that they have hired a third-party entity to fill positions within their organizations when questioned by career services staff.

Principle 5 for career services professionals permits them to request verification that the third-party agency has an employer for whom it is working and a job to fill. Career services practitioners may also ask whether the agency will charge fees to the student or the employer.

A corollary to *Principle 5* for third-party recruiters requires third-party agencies to permit career services staff to verify that the agency is recruiting for a bona fide position.

Because verification of information involves the exchange of proprietary information, the intent of these principles needs to be explained.

When the third-party section of the *Principles* document was developed, there was concern among some career services professionals that third-party recruiters might not have bona fide job opportunities, but rather were primarily interested in increasing their data bases of job candidates as a means of attracting more employers/clients. *Principle 5* in both the career services and third-party recruiter sections was developed specifically to allay this concern.

However, the intent of the NACE Principles for Professional Conduct Committee, which wrote the document, was that the employer/client would only be contacted if the career services practitioner had doubts that an actual position existed. Furthermore, once a third-party recruiter disclosed the name of the employer/client, career services staff would



assume “good will” unless there was some indication that the information was inaccurate. The language “Career services will be permitted to verify the information...” was included to provide notice to third-party recruiters that verification *could* occur. It was not intended to be used by career services practitioners to interfere with the relationship between third-party recruiters and their employers/clients, nor was it to be applied to every single position posted by a third-party agency. Moreover, if there is a need for verification, career services professionals should not attempt to solicit the company's recruiting business away from the third-party recruiter nor disclose the information to anyone else, including the student. One final note, there is a perception or misperception in the profession that NACE prohibits the use of third-party recruiters by employers or prohibits career services from permitting third parties to recruit on campus or attend career fairs. Nothing could be further from the truth. The *Preface* to the third-party principles states:

“These standards are designed to provide guidance to third-party recruiters who recruit college

graduates through the college recruitment process. These standards are not to be construed as requiring or encouraging, or prohibiting or discouraging, use of third-party recruiters by college or employer professionals.”

It is for each school and employer to determine whether and how a third-party recruiter's or online job site's services will be used in the recruitment process. Employers, career services professionals, third-party recruiters, and online services must be careful to conduct themselves ethically and legally to make the relationships work.

Note: The NACE Principles for Professional Conduct Committee will be reviewing the third-party principles this spring to determine if the *Principles* need to be revised or updated in any manner. In particular, the committee is looking at the definition of “third-party recruiter,” the obligations to protect student information, and the ethical obligations of online services. If you would like to provide feedback on any of these areas or submit an issue for consideration, please contact Rochelle Kaplan, staff liaison to the committee, at rkaplan@naceweb.org. 