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Winter 2004

BUSINESS & EMPLOYMENT LAW

## NEWSLETTER

### ISSUES IN HIRING AN EMPLOYEE

#### Recruiting Issues

*Job Advertisements* – Be careful what you include as a description of a job in an advertisement and the criteria that you use to eliminate a job candidate. At least one Court has ruled that a rejected applicant had an age discrimination claim based on a sloppy want ad. The company defended the claim by stating that the applicant was unqualified, listing several job requirements that the applicant had no experience in. The problem was that the job advertisement did not list the same criteria.

*Solution* – Be sure to define the job properly. What will this person be doing? What won't they be doing? What is, or is not, an essential job function? Be sure to establish qualifications such as job related education / licensures, work experience, and an ability to perform particular aspects of the job.

*Word of Mouth Recruiting* – Word of mouth recruiting is not per se discriminatory. It may, however, violate anti-discrimination rules if referrals are coming from sources that the employer should have known discriminated.

*Recruiting Agents* – A common practice among employers is to use third-party

recruiters such as employment agencies. At least one Court has held that an employer may be held liable if the employment agency engages in discriminatory practices. Therefore, it is important to inform employment agencies, in writing, of your expectation that they comply with requirements of the Americans With Disabilities Act and with Title VII.

#### The Employment Application

Most organizations use a standard employment application. The problem is that these forms are seldom updated. The employment application should be reviewed on an annual basis to be sure that it complies with any changes in the law.

Both the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission expect employers to be able to demonstrate that each of the questions on an application is related to the job for which the applicant is applying. For example, requesting information about graduation dates could lead to an age discrimination claim. Similarly, asking applicants whether or not they are home owners could be seen as racially discriminating if statistics indicate that fewer minorities own homes. The best practice is to keep all application questions relevant to the position available.

*What to Include in the Employment Application* – There should be enough space for the applicant to provide complete information about past employment. Ask for positions and allow enough room for multiple positions held with each employer. The fact that an employee has been promoted or transferred within a company is valuable information.

Also request salary information. Allow the applicant to provide starting and ending salary amounts.

Request that applicants provide a reason for leaving. It is permissible to ask whether the employee quit or was fired.

Also include:

- A statement certifying that the applicant was truthful in completing the application.
- Authorization to verify education and experience and to check credit information.
- A reminder that the applicant will be required to provide information for compliance with the Immigration Reform and Control Act.
- A statement that employment may depend on the results of a physical examinations, drug tests and/or other types of pre-employment tests.

## The Interview

Pre-employment interviews are perhaps the most important part of the hiring process. Each manager who interviews should be trained, not only in the various legal pitfalls which could result from an inappropriate interview, but also about how to ask the right questions to avoid hiring the problem employee. Managers should be educated about what not to ask.

The following questions are usually off limits:

- When did you graduate from high school?
- “Family Planning” and dependant care questions.
- Have you ever filed a workers’ compensation claim?
- Whether the applicant has a specific disability.
- Whether the applicant needs leave for treatment, when the applicant first became disabled and the like, even if the applicant volunteers that he has a disability.

Remember, the law permits inquiries about reasonable accommodation, not the disability or its nature or extent.

*What to Ask* – Educate your managers about what they should ask, especially to help identify high risk employees. The follow are good examples:

- Tell me about your professional relationship with your supervisors and coworkers.
- How would you describe your relationship with your last boss?
- What volunteer activities outside of work have you participated in, that would enhance your candidacy for this job?
- What did you accomplish in your last job that you are most proud of?
- What was the greatest challenge you faced in your last job and how did you handle it?
- What was the greatest disappointment you had in your last job?
- Why did you leave your last job? Previous jobs?

An employer may ask about an applicant's ability to perform both essential and marginal job functions. An employer may also ask the applicant if he can perform a specific function i.e. Can you lift 50 lbs? Can you drive a truck? You can ask an applicant to describe or demonstrate how he can perform the specific function; however, this request must be made of all applicants unless the applicant has an obvious disability which would prevent the performance of the particular function.

### **Pre-Employment Testing**

An employer may ask an applicant if they can perform a particular task essential to the job for or whether the applicant can meet the attendance expectations for a position. However, an employer may not ask about the nature or extent of a disability or how often the applicant would require leave for treatment necessitated by the disability. An employer also may not inquire into an applicant's workers' compensation history.

*Physical agility tests* are not medical examinations and may be given at any point in the application process. However, if the employer chooses to give a physical test, they must be given to all similarly situated applicants regardless of disability.

*Drug/Alcohol testing* – Generally, private employers are not subject to constitutional prohibitions that might prohibit drug/alcohol testing. The most important protections concerning drug and alcohol testing have to do with the process. If someone is rejected because they “flunked” the test, be sure you can demonstrate you were right and that you did not talk about it.

*Polygraph Examinations* – The Employee Polygraph Protection Act of 1988 significantly curtails an employers ability to

require polygraph testing of job applicants or current employees. Generally, employers may not require or request that an employee or applicant take a polygraph test. The Act permits polygraph testing of job applicants by the pharmaceutical industry and employers that provide security systems. A polygraph examination may only be required of current employees when an employer reasonably suspects that the employee was involved in a workplace theft or other misappropriation of property.

*Psychological / Honesty Tests* – Restrictions on an employer's use of polygraphs have led many employers to try alternative forms of testing in employee selection procedures, including psychological and honesty tests. Title VII expressly authorizes the use of “professionally developed” scored tests. However, tests that have a disproportionate impact on members of protected groups or which are applied in a disparate or discriminatory manner may nonetheless violate antidiscrimination rules.

*HIV Testing* – Generally, HIV testing is not a recommended course of action for the vast majority of employers. Individuals with AIDS are considered persons having a disability under the Americans with Disabilities Act and many state employment discrimination laws.

### **Consequences of Illegally Hiring Practices**

An employer may reduce potential liability to a third party by conducting thorough pre-employment background investigations and screening out applicants with a history of certain problems. These investigations, by their very nature, raise issues of discrimination and the prospective employees right to privacy. On the other

hand, to the extent no investigation is undertaken, an employer may be liable for negligently hiring a person who is incompetent or unfit.

**NEXT ISSUE: How to Terminate an Employee.**

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