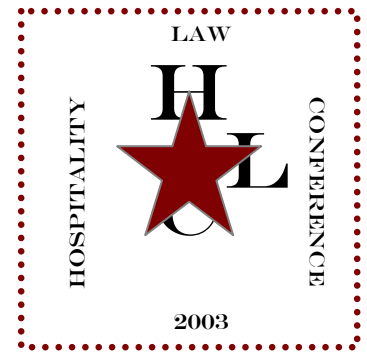


CHALLENGES OF THE HIRING PROCESS

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I. REASONS FOR THE HIRING PROCESS

A. Best Candidate to Fill the Position

1. To assist in hiring of the best candidate to fill the job thereby avoiding turnover and providing the best service for all customers/clients.
 - a. High turnover is costly in training time invested by managers
 - b. When employees change regularly it reflects a lack of consistency to customers/clients/guests as well as potentially erodes confidence in the company
 - c. Regular change in faculty and staff reduces the company's ability to attract quality staff if company has reputation for high turnover.

B. Avoid Negligent Hiring

1. To protect the company from liability for negligent hiring which may create a dangerous or unsafe environment not only for employees, but also for customers/clients/guests.
 - a. Companies have a duty to create a safe environment for their employees and for the customers/clients/guests that enter their facilities from foreseeable harm. Free from both physical and psychological injury.
 - b. Failure to conduct a complete and thorough pre-employment screening may result in missing important information that would assist in the determination to hire or not hire an individual.
 - c. Other potential but related claims:
 - i) Negligent Retention: Failure to discipline and/or terminate employee based upon discovered or admitted unsuitability for the job.
 - ii) Negligent Supervision: Failure to monitor and ensure employee performance falls within company standard of care for a safe workplace.

C. Avoid Claims of Discrimination

1. To create a process of consistency that treats each applicant in the same manner and assists in the defense of discrimination cases for failure to hire.
 - a. Create and conduct a process with the understanding that applicants, employees and investigator agencies (such as the EEOC) will presume that the employer uses all of the information it collects in making employment selection decisions.
 - b. Remember that information collecting is not limited solely to what is provided by the applicant on an application and/or resume. Everything said in every interview is a piece of the hiring process.
2. General Rule: Limit inquiries to only those subjects necessary to evaluate the applicant's suitability to perform the job for which he/she is applying but enough information to make a wise decision.

D. Avoid Claims of Fraudulent inducement and misrepresentation

1. Make certain that the same message is delivered to each applicant.
2. Want to make certain that applicants are not promised a job for life or a job that does not exist.
3. Want to carefully avoid making representations that induce an applicant to leave a current job or move that are not in fact true.

II. ELEMENTS OF THE HIRING PROCESS

A. Hiring Policy

1. Develop a hiring policy that is used for all hiring decisions.
2. Make sure it is one that the company wants to use and in fact does follow.
 - a. Better not to have a policy than to have a strict policy that the company doesn't follow.

B. Employment Application

1. Every applicant for employment should complete an employment application before any interviewing is conducted. Even if a resume is submitted. Even if the applicant comes to the company via a search firm. (Especially if it comes via a search firm.)
2. Application is a sacred document. The only person who writes on the application is the applicant. It is kept in the personnel file.

3. If the applicant is out of town and the interview is conducted by phone, have the applicant fill out the application and send it in before the phone interview.
4. Sample application is attached. Please note the top sections, which establish the EEO and ADA compliance.
5. Applications should include the following language above the signature line of the applicant:

I certify that the information given herein is true and complete to the best of my knowledge. I authorize the company to investigate any information, including my employment history, educational background, credit history and record of criminal convictions that it believes is relevant to my employment application. My former employers, educational institutions, and references may provide information that they may have about me in response to inquiry from the employer. I understand that false information; omissions or misleading information or misrepresentations given in my application or during the interview process may result in a refusal to hire, or discharge in the event of employment. . I understand that I shall be required to provide documentation establishing my legal authorization for employment within the first three days of my employment. I understand that if employed, my employment will be at will and that I will not have a contract for employment nor a guarantee of employment. The Employer is an Equal Opportunity Employer, and shall treat all employees and all applicants for employment equally and fairly based upon job related qualifications and in accordance with all applicable local, state and federal laws.

C. Interview Process

1. Either one or more individuals should be assigned to be responsible for assuring the process is followed.
2. Please see attached outline for what should and should not be discussed during the interview process.
3. Interviewers should be careful to only ask questions that will yield information relevant to the hiring process and not discriminatory.
 - a. If information on an applicants experience in the military is not relevant it should not be asked.
 - b. Questions such as “What year did you graduate?” a certain school is not relevant and may be looked at as a question regarding an applicant’s age.
4. Everyone involved in the decision should have the opportunity to interview each candidate being seriously considered to assure consistency.
5. Notes should not be taken on the application. A separate sheet should be created for notes if it is needed.

D. Background Checks

1. Reference Checks

- a. The company should conduct reference checks of the applicant.
- b. Similar questions should be asked of each reference.
- c. If the reference refuses to call back or refuses to provide any information of the applicant a record should be maintained of the dates and times efforts were made to contact the reference.
- d. The company may want to place reference check calls to names not provided by the applicant. This is appropriate and may lead to helpful information.
 - i) Supervisors above the names provided by the applicant
 - ii) The reference checker's counterpart at the other company
 - iii) You can always ask the reference for names of people that he/she thinks will be good people to talk about the applicant
 - iv) Personal references may be a little biased, but still provide good information and are not as concerned as companies with fear of litigation based on the reference
 - v) HR Departments may not give much information but still may be worth calling
 - vi) Your own friends/contacts at the applicant's company that may know the applicant
- e. A helpful question is always, "Is this individual eligible for rehire."
- f. Remember that an applicant is first going to provide the reference names for people that are most likely to give him/her a positive reference. Asking the applicant for a number of references may force the applicant to give the company names of people that will be honest about the applicant's performance.
- g. Remember the same rules apply in the reference checks as apply in the interview process. Only ask questions which will provide information you wish to use in the hiring process.

2. Credit Checks

- a. Can be conducted.
- b. Should only be used if the information is relevant to the position that the applicant is applying for. Example: May want to perform a credit check for an applicant in the Controllers office or in any position in which either corporate funds or a guest's money is at risk.

- c. Be careful to conduct such checks if required by insurance as part of due diligence.

3. Criminal Background Checks

- a. While this is not required, except in certain industries (like schools), more and more employers are doing criminal background checks as a way to minimize potential liability for negligent hiring and create as safe a workplace as possible.
- b. The FBI check is not as comprehensive as we may think.
- c. Companies may want to consider conducting background criminal background checks in addition to the FBI check. Not everything makes its way to the FBI database.
- d. Make sure that you do not “pick and choose” which applicants to screen for criminal background. It is either all or nothing (you could segregate based on position within the company). Failure to follow a consistent policy with regard to which applicants are required to submit to criminal background checks could be viewed as discriminatory.
- e. Failure to have a clear, consistent job descriptions may preclude having clear, consistent pre-screening criteria.
- f. Make sure to develop pre-screening rejection criteria. When you say, “we’re doing a criminal background check,” be prepared to take immediate action if the background check comes back with specific types of convictions.
- g. It is imperative to alert the applicant that you will be doing a criminal background check and to receive the applicant’s authorization for the check.
- h. Companies must be sure to comply with the Fair Credit Reporting Act when doing criminal background checks is using an outside agency to do the checks.
- i. Supply a copy of the background screening results to the applicant prior to adverse action or upon request.
- j. Provide applicant with the name of the agency that performed the background check.
- k. Companies can confront the applicant with potential discrepancies between the application/resume and the screening results.

4. Internet Check

- a. Each applicants name should be entered into a database on the Internet for purposes of determining whether or not they appear on any child molestation web sites or in any form of news media coverage.

5. Verification of Education and Prior Jobs

- a. Applicants lie.
- b. Verification of all education as well as prior jobs should be conducted.
- c. Records should be maintained of the verification procedure.

What Should and Should not be Asked

DURING THE HIRING PROCESS

I. INTRODUCTION

- A. Common pre-employment inquiry subjects that may present job bias problems
- B. Avoid soliciting information that, if used as the basis of an employment decision, could be perceived as discriminatory
- C. Conduct process with the understanding that applicants, employees and investigatory agencies will presume that the employer uses all of the information it collects in making employment selection decisions
- D. General rule is to limit inquiries to only those subjects necessary to evaluate the applicant's suitability to perform the particular job for which he/she is applying

II. ELEMENTS TO REVIEW

- A. Employment Application
- B. Interview Process
- C. Reference Checks
- D. Notice Postings In The Interview Area
- E. Employee Handbook

III. FACTORS TO CONSIDER

- A. Name
 - 1. Employers may ask job applicants to identify themselves by name
 - 2. An employer must know the applicant's name in order to properly process an applicant for employment (i.e.: reference checks are only possible if the applicant can be identified)
 - 3. Proper to ask applicants whether they previously have worked for a another company, or for the employer under a different name but avoid asking questions such as what is your maiden name or your unmarried name
 - 4. Employer can also ask whether there is any other name they should be aware of in order to adequately check the applicant's employment or educational history

5. Avoid asking applicants questions regarding their maiden names, or what their name was before any formal change by court order, since names can convey national origin identification
6. Additionally, requesting applicants to identify themselves by titles that reveal their marital status, when this information is not job-related, may raise sex discrimination concerns (i.e.; Miss, Mrs)

B. Place of Residence

1. Since employers need to know an applicant's address in order to correspond by mail, asking an applicant's address is acceptable
2. Other inquiries concerning residence raise legal problems (i.e.: whether or not an applicant owns or rents the residence can have little relationship to job requirements, but may indicate economic status, which is prohibited ground of discrimination in some jurisdictions)
3. Length of time in any residence or a list of previous addresses can have little bearing on how well an applicant might perform a job, but might indicate an impermissible concern about racial or ethnic identification or economic status

C. Age

1. Employers should avoid asking applicants their age as questions concerning age are not related to an applicant's ability to perform a job and may raise claims of age discrimination
2. Questions regarding the dates on which an applicant started and/or completed school can be perceived as a means by which to estimate an applicant's age

D. Citizenship or Birthplace

1. The Immigration Reform and Control Act of 1986 (IRCA) prohibits employers from hiring or continuing to employ aliens not authorized to work in the United States, and establishes a verification procedure for this purpose
2. Both the IRCA and Title VII prohibit employment discrimination based on national origin. In addition, the IRCA prohibits employment discrimination based on citizenship and intended citizenship
3. Avoid asking questions regarding an applicant's national origin or birthplace outside of the context of the verification procedure, which is performed after employment
4. Allowed to ask a potential employer whether after employment he or she can submit verification of a legal right to work in the United States
5. Not appropriate to ask whether an individual is citizen of the United States

E. Religion

1. Refrain from inquiring into an applicant's religious faith, denomination, or affiliation, except in those rare instances where religion is a bona fide occupational qualification
2. Do not ask applicants what religious holidays they observe or whether their religion prevents them from working on weekends or certain holidays
3. If employer is concerned about adequate staffing on Saturdays and Sundays, it may ask applicants whether they are regularly available for work on those days
4. If employer is going to request work on an employee's religious holiday, it has a legal obligation to make reasonable accommodations to the employee's religious observations and practices

F. Race or Color

1. Employer should not ask applicants to identify their race or color
2. Employer should not ask applicants to submit a physical description or a photograph of themselves
3. Inquiries about an applicant's complexion or color of skin, eyes, or hair, may reveal racial or ethnic characteristics, which may serve as grounds for discrimination claims
4. To further avoid claims of racial discrimination, applicants should not be given the option of submitting a photograph before the hiring decision is made
5. EEO reporting and record keeping and affirmative action requirements
 - a. Identification should be conducted either visually by the interviewer, or by voluntary self-identification on separate forms, which are not part of the employment application, the interviewer's notes or personnel files
 - b. Employer should take care that no notations regarding race or color are made on the job application itself
 - c. In the event that there is a challenge to an employment decision, an employer will have a difficult time explaining that a notation on a job application pertaining to the subject's race or color was not used in the selection process but only as an affirmative action or EEO measure

G. Gender

1. Any inquiry pertaining to gender on an employment application or during an interview should be stricken unless gender is a bona fide occupational qualification
2. Questions about marital status rarely have a legitimate purpose, and more frequently have been considered evidence of discrimination against women
3. Similarly, questions about an applicant's child-rearing or child-bearing plans are unrelated to suitability for employment

4. Even when an employer asks all applicants, male and female, whether they have children or other dependents and what provisions they would make for childcare if they were hired, such questions could be considered as evidence of an intention to discriminate against women since these tasks traditionally have been considered a woman's responsibility

H. Height and Weight

1. Pre-employment inquiries concerning a job applicant's height or weight tend to impermissibly screen out women, certain ethnic or national origin groups, and physically handicapped individuals
2. Such questions should only be asked if they are demonstrably related to the safe and efficient performance of the particular job

I. Foreign Language Ability

1. Language facility is strongly indicative of national origin, and should not be inquired into unless it is strictly job-related
2. Employers may ask job applicants which foreign languages they read, speak, or write, if foreign language facility is required for the job
3. Employers should not ask applicants about their "mother tongue"
4. The language commonly used by an applicant's spouse or other family members is not relevant in pre-employment inquiries
5. If an applicant admits to having some foreign language facility, the employer should not ask how the applicant came to acquire the ability to read, write or speak the language

J. Education

1. Employers are legitimately concerned with job applicants' relevant academic, vocational, or professional education and may inquire into the extent of such education and the names of the schools attended
2. Employers may ask applicants what job-related degrees or diplomas they have received
3. All questions concerning education should be open-ended, as different positions require different levels of education
4. Employers should avoid asking applicants whether the schools attended had any specific ethnic, racial, or religious affiliation
5. Employers should not ask for the dates of attendance at school since dates of attendance may be indicative of age

K. Work Experience

1. Employers are entitled to ask prospective employees about their work experience and specific skills that are pertinent to the requirements of the job for which they are applying
2. Employers are entitled to ask applicants for the names and addresses of former employers, the dates during which the applicant worked at each, the positions the applicant held, and the applicant's reason for leaving each employer

L. Military Experience

1. Employers should limit inquiries into an applicant's military experience to questions concerning relevant skills and training acquired in the military service that would be helpful for the particular job applied for
2. Employers should not ask applicants whether they served in the military of another country
3. Neither should Employers inquire into the type of military discharge the applicant received, unless this is specifically job-related
4. If the inquiry is necessary, the question should be followed by a statement that a less than honorable discharge from the military is not absolute bar to employment
5. Employers should not require job applicants to submit their military discharge or service records prior to employment

M. Personal or Professional References

1. Employers may ask applicants to list the names of those who would be willing to attest to their qualifications and character
2. It also is permissible to ask applicants who referred them to the company
3. The questions directed to such references should stay within the bounds of permissible pre-employment inquiries

N. Arrest Records

1. Because arrests, unlike convictions, are not conclusive of wrongdoing, the fact of an arrest can have very little bearing on any legitimate requirements for a job
2. Questions about arrests also have been found to be discriminatory
3. Employers should not ask job applicants whether they have ever been arrested

O. Criminal Convictions

1. Employers may be concerned about whether prospective employees have ever been convicted of a crime
2. Criminal convictions should only bar employment if they have a direct relationship to the requirements of the particular job

3. If Employers ask applicants whether they have ever been convicted of any crime, it should follow the question with a statement that criminal convictions are not an absolute bar to employment but will only be considered in relation to specific job requirements

P. Personal Finances

1. Questions about an applicant's personal finances are troublesome because of the potential discriminatory effect against women or minorities and the slim relationship to actual requirements for jobs
2. Women or minorities may have credit histories that reflect discriminatory credit practices
3. Employers should not routinely ask applicants about assets, liabilities, charge accounts, bank accounts, or credit ratings
4. Questions about past wage garnishments or personal bankruptcy also should be avoided unless job related
5. Questions about home ownership or car ownership are inappropriate for many of the same reasons
6. If car travel is required for the job, it is more appropriate to ask whether the applicant has available means by which he/she can get to work rather than to inquire about car ownership
7. Employers also should avoid asking applicants about the specific methods used in order to get to and from work (i.e., public transportation, car pool, etc.)

Q. Relatives or Close Friends

1. Employers that ask applicants whether they have any relatives or close friends working for the firm can get into trouble under various circumstances, depending on whether they use the answers to extend a preference for those applicants who are well-connected or to exclude applicants who may be related to someone in the workforce
2. If women or minorities are under represented in the Employer's workforce, preferences for relatives or close friends can have an adverse effect against protected group members
3. If Employers ask applicants to identify relatives or close friends in the workplace as a means of enforcing an anti-nepotism policy, issues of discrimination can still arise
4. Specifically, a rule against hiring both husbands and wives may have an adverse impact on women or be found to discriminate against individuals on the basis of marital status
5. Employers should not ask applicants to list the names of relatives, spouses, dependent children, or those with whom the applicant lives, since the list of names may indicate national origin
6. Legitimate questions about family members of employees for insurance or benefit administration purposes should be asked after the selection decision is made

7. Job applicants should not be asked whom the employer should notify in case of emergency. This is only an issue if the applicant is hired, so the question should wait until after the selection is made

R. Voluntary Associations or Union Affiliation

1. Employers should not ask applicants to list organizations, clubs, societies, or other voluntary personal or professional associations
2. Listings of these types would likely reveal race, religion, sex, or national origin and could only have a tangential relationship to job requirements
3. Employers may ask applicants to list those associations, such as professional or technical organizations, that the applicant thinks may have some bearing on job requirements
4. Inquiry into political affiliations is also discouraged
5. Questions about union membership or sentiments should not be asked

S. Physical Condition or Handicaps

1. All employers are legitimately concerned that applicants and employees have the physical ability to perform the job
2. The Americans With Disabilities Act (ADA) limits employers from making pre-employment inquiries into an applicant's physical or mental impairments. (Such questions are regarded as discriminatory against disabled individuals since they can reveal impairments that may necessarily prevent an applicant from performing the job applied for)
3. Employers may ask applicants whether they can perform the job-related functions, with or without reasonable accommodation
4. If an applicant responds affirmatively to this question, Employers can ask the applicant to demonstrate or explain how, with or without reasonable accommodation, he/she will perform the job (note: a request for this type of demonstration or explanation can be made only if it is asked of all applicants, not just of those who may have a disability)
5. The only exception to this is if the applicant's disability is known or obvious. If such a disability affects a job-related function, Employer can ask for the demonstration or explanation even if it does not pose the same question to other applicants. If the known disability would not affect job performance, the request cannot be made unless made of all applicants
6. Three rules to remember when preparing for the employment interview:
 - a. Do not mention the words "disabled" or "handicapped"
 - b. Do not frame questions in terms of an applicant's medical condition or limitations, but rather in regard to his or her conduct, behavior, and ability to perform

- c. Phrase questions in the positive, not the negative. For example, ask about an applicant's abilities, not disabilities
7. Questions Employer **cannot** ask prior to an offer of employment:
- a. Are you disabled?
 - b. Are you currently using prescription drugs?
 - c. Have you ever filed a claim for workers compensation?
 - d. Has your use of medical benefits in the past been high?
 - e. How many days were you absent from work last year (in the last two years, three years) because of illness or disability (or treatment for substance abuse)?
 - f. Have you ever had a substance abuse problem?
 - g. Are you currently in treatment for alcoholism or drug addiction?
 - h. Are you an alcoholic or drug addict?
8. Questions Employer **can** ask prior to an offer of employment?
- a. Do you drink alcohol?
 - b. Do you currently use drugs illegally?
 - c. Are you able to perform the specific responsibilities of the job for which you are applying for with or without a reasonable accommodation?
 - d. Have you ever been convicted of a drug or alcohol related felony?
 - e. Did you have any performance problems or complaints at your last job?
 - f. How many days were you absent from work last year?
 - g. Can you meet the requirements of Employer's normal work hours and work schedule?
 - h. Would you require any special work hours or time off?
 - i. Did you have performance problems or complaints at your last job?
9. If the disability is obvious (e.g. loss of a limb), or information is volunteered by the job applicant about his or her disability, the following inquiries are permissible and appropriate:
- a. Are you able to perform the various responsibilities of this job with or without a reasonable accommodation?

- b. If "with a reasonable accommodation," what accommodation(s) would be necessary?
- c. Can you describe or demonstrate how you would perform these responsibilities?