

Critical Issues on Hiring, Firing and Everything in Between

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Presented by:

David K. Haase
Jenner & Block LLP
One IBM Plaza
Chicago, Illinois 60611
312 923-2710

JENNER & BLOCK

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PRACTICAL GUIDANCE ON HIRING

I. General

The hiring process has four stages: obtaining applications, reviewing applications and interviewing applicants, conducting reference and background checks on individuals being seriously considered, and finally, in some cases, conducting pre-employment tests. Each has its own practical and legal considerations.

One general consideration which employers should keep in mind throughout these four stages is the indirect effect of certain employment practices on members of statutorily protected groups. Federal and many state laws prohibit discrimination based on age (if over 40), sex, marital status, pregnancy, national origin, race, religion or disability (handicap). The governmental agencies charged with enforcing federal and state anti-discrimination laws have successfully taken the position that employers' actions in the hiring process which have the effect of excluding such individuals, even if unintended, can be unlawful.

Other potential legal problems in the hiring process include:

1. The Americans with Disabilities Act imposes several strict requirements in hiring.
2. Negligent hiring lawsuits are increasing.
3. The trend toward expansion of employment discrimination claims continues.

A preliminary step to minimize legal risk in hiring is to prepare (or review) job descriptions to ensure they:

1. Accurately describe the actual duties of the job presently performed;
2. Distinguish between essential and marginal functions;
3. State what must be accomplished, rather than how the job must be done.

II. Obtaining Applications

Many dangerous questions are used as a result of copying old application forms or asking traditional questions, and the answers may not be important to the company. However, courts normally assume that if a question was asked, the answer played a part in any adverse employment decision.

A. Word-of-Mouth Advertising.

Word-of-mouth advertising for job openings ordinarily is lawful. If, however, the employer's work force has few minorities, such "advertising" is likely to result in few minority

applicants. Therefore, in such situations, word-of-mouth advertising should be supplemented with other forms of publication.

B. Location of Advertisements.

Advertisements should be placed in areas which have some ethnic diversity. If advertisements are placed only in homogenous areas, and the resulting applicant pool has few minorities, the employer could be held liable.

C. Contents of Advertisements.

Advertisements should not directly or indirectly request that applicants be of a certain age, gender, race, religion, national origin, sexual orientation, or disability status, unless there is a demonstrable business necessity for such an individual. In fact, perusal of any day's classified ads in almost any major newspaper will yield advertisements requesting a "waitress," "waiter," "serviceman," "scoregirl," or using other words implying that only applicants of a certain gender or age range should apply. Such advertisements, however, can be construed as evidence of discrimination.

D. Use of Employment Agency or Headhunter.

Use of an employment agency or headhunter to hire employees does not relieve the employer from its legal responsibilities. An employer may be legally liable for violations of the law committed by an employment agency while recruiting individuals for the employer.

III. Application Forms and Interview Questions

A. General Considerations.

The legal issues are essentially the same for application forms and interviews. If a question should not be asked, that is the case regardless of whether the question is oral or written.

Employers should not ask questions about the applicant's race, national origin, sex, religion, marital status, pregnancy, disability, sexual orientation, or age. Questions which indirectly elicit such information also should be avoided. Furthermore, information correlated with one of these classifications should not be elicited, because such questions could have the effect of excluding applicants on the basis of the protected classification.

It is impossible to provide a comprehensive list of "do's" and "don'ts" based on these broad considerations. The best approach is to identify the functions of the job(s) at issue, consider whether the inquiry is job-related and consistent with business necessity, and tailor the inquiry as narrowly as possible. This approach is best illustrated by example. If regular and timely attendance is required, the employer could ask if the employee has a reliable means to get to and from work, thus obtaining the needed information. The employer should not, however, ask if the applicant has a car. Because race and economic status are correlated, such a question

could have the effect of screening out minorities. Moreover, the question does not focus on what the employer wants to know: the applicant may have another reliable means to get to work. If, on the other hand, the position requires the use of a car during the work day, it would be appropriate to ask if the applicant has access to a car.

During interviews, one should be especially careful because in the flow of conversation one does not have the same opportunity to reflect on whether a question is appropriate (or to contact counsel) as when drafting an application form. One good rule of thumb is to avoid personal questions, seeking only specific information that is demonstrably related to successful performance of the job at issue or essential to the employer's business.

B. Specific "Do's And Don'ts".

The following are some of the most common issues regarding pre-employment inquiries.

1. Name, Address, And Family Status.

The employer should not ask the applicant to disclose his/her marital status. In this regard, the employer should also not ask for the applicant's maiden name or for a "Mr., Mrs., Miss or Ms." designation because the answers to those questions may disclose marital status. However, an employer may ask whether the applicant ever has used another name, to facilitate background checks.

The employer should not ask about childbearing, pregnancy or familial responsibilities. Nor should the employer ask the number or ages of dependents.

While asking current address apparently is lawful, there is some risk in asking the length of residence at the current address, because minorities statistically are more transitory.

2. Birthplace.

Birthplace should not be asked because the answer to this question discloses national origin. However, an employer can and should ask if the applicant can submit proof of right to work in the U.S., if hired.

3. Age.

Date of birth should not be asked. However, the employer can ask if the applicant meets the minimum age requirements established for the position (e.g., "Are you under 18" or "under 21").

4. Race, Color Or Sex.

Any inquiry which indicates race, color, or sex should be avoided, except when asked pursuant to a bona fide affirmative action inquiry.

5. Religion or Creed.

Any inquiry into a applicant's religion, religious denomination, affiliation, church, parish, pastor or religious holidays observed prior to hiring should be avoided.

6. National Origin.

Inquiry into an applicant's lineage, ancestry, national origin, descent, parentage, or into the nationality of his/her parents or spouse, should be avoided.

7. Sexual Orientation.

Inquiry into an applicant's sexual orientation (heterosexual, homosexual, bisexual) or history of sexual activity likewise should be avoided.

8. Economic Status.

Ordinarily, questions regarding wage garnishment history, credit history, or home ownership should not be asked due to the possible screening-out effect on minority applicants, unless a job-related purpose consistent with business necessity can be demonstrated (e.g., a job in the financial area of the employer's business).

9. Workers' Compensation History, Medical History, Disability Or Handicap.

Questions regarding the applicant's workers' compensation history, medical history, current state of health, prior illnesses, and physical or mental disability (handicap) cannot be asked on application forms. Also, the common question "Do you have any disability or condition which would impair your ability to do the job for which you are applying" must be avoided. However, it is permissible to make pre-employment inquiries into the ability of an applicant to perform job-related functions so long as the inquiries are not phrased in terms of disability. Thus, an employer could ask, "Is there any reason you may not be able to do the job for which you are applying."

10. Criminal Record.

Employers should not ask about the applicant's arrest record, but may ask about convictions. Nevertheless, employers should not apply blanket exclusions of applicants with conviction records. Rather, employers should ask the type of conviction, the date of the conviction, and the circumstances of the conviction prior to making any final decision about the applicant. Applicants also should be obligated to report immediately a felony conviction or other crime involving dishonesty.

11. Veterans.

Certain states prohibit discrimination based on “unfavorable discharge” from military service (which is less severe than “dishonorable discharge”), unless the position at issue involves fiduciary duties. Employers should tailor pre-employment inquiries accordingly.

12. Work History.

Employers should ask whether the applicant has been fired or forced to resign from employment, and if so, to describe the circumstances.

13. Education.

An employer’s requirement of a high school education as a prerequisite for being hired or transferred is unlawful if it cannot be shown to be significantly related to successful job performance. This rule is most often applied in cases involving blue collar, unskilled or semi-skilled positions. Thus, if an employer cannot prove that a certain level of education is necessary for the job, then the question should not be asked.

14. Height And Weight.

It is unlawful for an employer to set minimum height and weight requirements unless for a legitimate job need. Thus, height and weight questions ordinarily should be avoided.

15. Local Laws.

Employers should be aware of additional requirements or restrictions imposed by local law, and modify their pre-employment inquiries accordingly.

16. Equal Employment Opportunity.

An employer should have language on its application that it is an “equal employment opportunity employer” which does not “unlawfully discriminate on the basis of race, national origin, religion, age, sexual orientation, gender or disability/handicap status.”

17. Affirmative Action Requirement.

An employer that has created a bona fide affirmative action plan should designate on its application form that it is an “affirmative action employer.” Pursuant to a bona fide affirmative action plan, such an employer may request information regarding race, color, religion, sex, national origin, disability (handicap) status, provided the request makes clear the purpose in asking for the information, that providing such information is voluntary and failing to provide such information will not be treated adversely, and that such information will be kept confidential. Affirmative action employers should consider a tear sheet on the application so that the tear sheet may be separated from the application and used only for purposes unrelated to the selection process.

18. At-Will Employment.

Employers should consider obtaining an acknowledgment by the applicant that employment is terminable “at-will,” i.e., with or without cause and with or without notice. In addition, because oral representations can be as contractually binding as written commitments, employers should be certain not to say anything which could give the impression that employment is anything other than “at-will.” Any written offers of employment also should be closely scrutinized in this regard.

19. False Statements and Material Omissions.

An employment application should contain a declaration by the applicant under penalty of perjury that the information provided is true and that any false statements or material omissions can disqualify the individual from further consideration for employment or result in termination of employment after placement. Applicants should also be obligated to report immediately a felony conviction.

IV. Reference and Background Checks.

An employment application also should authorize the employer to make a thorough investigation of the applicant’s prior employment and educational background, and to release all cooperating parties from liability.

A thorough inquiry into the applicant’s background before hiring is invaluable, because it is much easier to reject an unsuitable applicant than to terminate an unsuitable employee. In addition, such an inquiry can protect the employer from liability under a “negligent hiring” lawsuit, especially if the results of the investigation are documented.

An employer may be held liable for negligent hiring when an employee harms another while on the job and the employer knew or should have known that such an injury was likely to occur before hiring the individual. Liability for negligent hiring most often arises when the employee commits a crime, the employee had a conviction record which made the crime foreseeable, but the employer did not know of the criminal record due to inadequate pre-hire background check.

The thoroughness of the employer’s investigation should vary with the extent to which the employee will have the opportunity to commit wrongdoing while on the job. Positions involving access to confidential information, large amounts of pay, or extensive unsupervised contact with the public (e.g., a doctor), and, in particular, positions for which the employee will be issued a pass key to apartments (e.g., a resident manager, painter or maid), a weapon (e.g., a security guard) or authorization either to drive a company vehicle or to drive for the company during work time demand extra scrutiny.

A. Examining And Verifying Information On Applications And Resumes.

The information the employer should examine will vary based on the employer's needs and the position at issue. One basic thing to look for is unexplained gaps in employment, as the cause for such a gap often will reveal important information about the applicant.

Beyond reviewing the information contained in these documents, the employer should verify key facts asserted by the applicant; studies show that many applicants misstate basic facts on application forms and resumes. Thus, for example, if the job at issue requires a certain level of education or a particular degree, the employer should verify this fact. Often, a simple phone call to the educational institution or requiring submission of a certified transcript will provide the needed verification.

B. Contacting Former Employers.

Some employers, frustrated by the repeated experience of former employers refusing to provide information, no longer contact former employers of applicants. Such refusals often are due to the rise in defamation lawsuits against employers for providing poor job references. Despite this problem, however, contacting former employers should remain a part of the pre-employment screening process, for three reasons.

First, even the most cautious former employer usually will verify dates of employment and positions held. This information will enable the hiring employer to detect an applicant's efforts to conceal gaps in employment. Second, if the hiring employer makes an effort to obtain substantive information, is rebuffed, and documents the effort, it has some protection against a negligent hiring lawsuit. For example, suppose that an employer hires a child care worker who was terminated by a former employer for child molestation, and the new employer is sued for negligent hiring when the employee molests a child on the job. If the employer now calls the former employer, it has a problem. If, on the other hand, the employer can document that it called the former employer but the latter refused to provide any information, the employer is in a much stronger position to defend its actions. Finally, many former employers are willing to provide substantive information to prospective employers. Practical tip: go outside of Human Resources and talk directly to the applicant's immediate supervisor.

C. Criminal Records.

Screening employees with obvious criminal propensities is important for avoiding liability for negligent hiring and for avoiding other problems with the employee. Therefore, employers ordinarily should ask applicants about any criminal convictions. Needless to say, not all applicants are completely forthright about their conviction records, so for appropriate positions, the employer should verify conviction information by obtaining forms and instructions from government agencies. Because minorities are both arrested and convicted with disproportionate frequency, there are limitations on how such information should be obtained and used. Employers may not ask applicants about arrests. Moreover, applicants with a

conviction record should not be excluded automatically. The employer should consider the nature of the crime(s), how long ago it occurred, and the relation of the crime to the job at issue.

D. Consumer Credit Checks--Fair Credit Reporting Act Obligations.

The federal Fair Credit Reporting Act creates certain rules regarding background checks, where the employer uses a third party to obtain the information. For some such inquiries, notice must be provided to the employee or applicant and additional notice if the information obtained is used to deny employment. In addition, some state laws have broader requirements for such inquiries, and can require notice even if a third party is not utilized.

E. Promotions.

Employers often do not take similar precautions in promoting an existing employee as they would in hiring a new employee to that same position. Yet, just as an employer can be liable for "negligent hiring," it can be held liable for "negligent promotion." For example, suppose a condominium association hires a greens keeper without verifying his or her conviction record, and later promotes the employee to a position which gives him or her access to unit owners' homes, without first obtaining such verification. If the employee attacks a unit owner in his or her home and it turns out that the employee has multiple convictions for assault, the employer could be held liable for negligence in promoting the employee (or "hiring" the employee for the new position). Therefore, depending on the position at issue, many of the precautions described above should be taken for promotions as well as for newly hired employees.

F. Proof Of Legal Right To Work In The United States.

After accepting a job applicant, the employer is obligated to verify the employee's eligibility to work in the United States. To do so, the employer must complete Immigration and Naturalization Service Form 1-9, which contains self-explanatory instructions. However, an employer must ensure that it applies its 1-9 requirement uniformly and does not require more supporting documentation for applicants of particular ethnic groups.

V. Pre-Employment Testing.

A. Medical Testing.

The Americans with Disabilities Act ("ADA") places restrictions on preemployment medical testing. Essentially, medical examinations and inquiries may only be conducted after the applicant has received an offer of employment conditioned on passing a medical examination. However, if the results of such an examination are used to screen offerees with disabilities, the employer must show that the exclusionary criteria are job-related and consistent with business necessity, and that the performance of the essential job functions cannot be accomplished with reasonable accommodation.

B. Lie Detector Tests.

Federal law forbids the use of polygraph or “lie detector” tests at the hiring stage. Federal law also severely restricts the use of such tests for current employees.

C. Written Examination.

Many employers use written examinations in an attempt to measure the applicant’s honesty, integrity, intelligence, psychological fitness or specific job skills. Such tests, however, pose a maze of potential hazards.

A written examination has an “adverse impact” if a disproportionately large percentage of minority applicants fail the test. Because such a test has the effect of screening out minority applicants, even if that effect is unintended, the employer must justify the use. To do so, the employer must “validate” the test, i.e., demonstrate that success on the test has a relationship to successful job performance.

The Equal Employment Opportunity Commission regulations require that a test be validated prior to its use; that such validation be done through a complex, expensive and lengthy process, generally requiring the retention of a professional, such as an industrial psychologist; and that the employer keep detailed records to facilitate determination of whether the test has a disparate impact. The expense of compliance with these regulations has caused many employers to forego such testing in favor of probationary periods of employment.

D. Race Norming.

Race norming, i.e., automatically adding points to the test scores of blacks, Hispanics, or others to make up for possible discrimination in the test questions, is banned by the Civil Rights Act of 1991.

VI. Effective Management of the Application Process.

1. Consider creating a new formal application process that limits individuals’ ability to convert their status to that of “job applicants.” Such a process will minimize the risk of finding a statistically significant “adverse impact” against protected groups (e.g., women, minorities, elderly). Where feasible, consider a uniform policy that consistently:
 - a. Rejects oral expressions of interest;
 - b. Rejects unsolicited resumes and incomplete applications; and
 - c. Limits the scope of applications to specific open positions.
2. Consider limiting the period of considering application to the shortest time feasible.

3. Consider a selection process that divides applications and openings into numerous, discrete employment decisions.
4. Do not circumvent normal hiring procedures or fail to publicize openings.

A PRACTICAL REVIEW OF DISCHARGE DECISIONS

I. <u>Seven Tests of Just Cause</u>	Yes	No
1. Did the Company give the employee warning of the possible or probable disciplinary consequences of his conduct?		
a. Was the warning given orally or in writing?		
b. Was there actual communication of the rules to the employee? Was the communication oral or in writing?		
c. If there was a lack of communication, was the offense so serious that an employee should properly be expected to know already that such conduct is offensive and punishable?		
2. Was the Company rule or management order reasonably related to the orderly, efficient, and safe operation of the company's business and the performance that the company might properly expect of the employee?		
3. Did the Company, before administering discipline to an employee, make an effort to discovery whether the employee did in fact violate or disobey a rule or order of management?		
a. Did the employee know with reasonable precision the offense with which s/he is being charged in order to defend the behavior?		
b. Was the company's investigation completed <u>before</u> its disciplinary decision was made?		
c. If management had to react immediately to the employee's behavior, did it merely suspend the employee pending investigation with the understanding that the final disciplinary decision will be made after the investigation and if the employee is found innocent after the investigation, s/he would be restored to his/her job with full pay for time lost?		

A. Seven Tests of Just Cause	Yes	No
d. Did the company's investigation include an inquiry into any possible justification for the employee's alleged rule violation?		
4. Was the company's investigation conducted fairly and objectively?		
a. At the investigation, was a management official other than a witness the "prosecutor"?		
b. Did some higher, detached management official assume and conscientiously perform the judicial role?		
c. Did the management "judge" question the management and other supporting witnesses rigorously and thoroughly?		
d. Did the management "judge" carefully review all witness statements, company reports and other documents?		
5. At the investigation, did the management "judge" obtain substantial evidence or proof that the employee was guilty as charged?		
a. Was the evidence truly substantial and not flimsy?		
b. Did the management "judge" actively search out witnesses and evidence and not just passively take what participants or "volunteer" witnesses said?		
c. Did the management "judge" originally have reasonable grounds for believing the evidence presented to him by his people?		
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?		

A. <u>Seven Tests of Just Cause</u>	Yes	No
a. Has management insured that none of the applicable rules or policies had an adverse effect on any specially protected group?		
b. If any such rule had such an adverse effect, can management nevertheless justify application of this rule on a “business necessity” standard?		
c. Have other employees who have previously committed similar types of misconduct received the same penalty? (Be prepared to document the names of such employees, as well as the date and nature of the penalty.)		
d. Has no other employee who has previously committed similar types of misconduct received a lesser (or no) penalty?		
e. If management had previously been lax in enforcing its rules and orders previously and decided to henceforth apply them rigorously, did it advise employees beforehand of its intent to enforce the rules in question more rigorously?		
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense, and (b) the record of the employee and his service with the company?		
a. If the offense proven was merely trivial, is harsh discipline merited by the employee being found guilty of the same or other offenses a number of times in the past?		
b. Does the employee’s record of previous offenses support the severity of discipline?		
c. If the same proven offense exists for two or more employees, do their respective records provide a basis for “discriminating” in administering discipline?		

B. Maximizing Victory	Yes	No
1. Did the Company “lock” in the details of the accused employee’s (most important) and the employee witnesses’ versions so they cannot “creatively” change their accounts? (Consider open tape-recording or written statements from accused employee.)		
2. Did the Company provide the employee (if union represented) upon request the right to union representation at an investigatory hearing where discipline was reasonably likely to result?		
3. Did the Company carefully investigate the claims of its witnesses (whether they are unbiased employees, supervisors or managers) and <u>carefully</u> document these claims?		
4. Did the Company carefully screen and evaluate its existing documents <u>before</u> handing any of them over to the union?		
5. Did higher management conduct an <u>independent review</u> of the written documentation to determine whether it supported the decision to discharge, including a review of the “seven steps?”		
6. Does management’s written recommendation address all “seven steps” of the just cause criteria and does it indicate that they all were met?		
7. Was the discharge decision given to the employee in writing?		
8. Was the termination decision kept as confidential as possible, involving only those managerial employees with a need to know, in order to minimize the risk of invasion of privacy and defamation issues?		
9. Did the Company attempt once more to “lock in” the accused employee’s account of the incident in the grievance hearing? (By using the grievance hearing as an opportunity for “discovery” of accused employee’s version, by filling-in holes in the Company’s version, etc.)		