Critical Issues on Hiring, Firing and Everything in Between

American Association for Community Dental Programs Conference

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Hiring Decisions
Overview

- General Considerations
- Obtaining Applications
- Application Forms and Interview Questions
- Reference and Background Checks
- Pre-employment Testing
- Effective Management of the Application Process
The hiring process has four stages:

- Obtaining applications
- Reviewing applications and interviewing applicants
- Conducting reference and background checks on individuals under serious consideration
- Pre-employment testing
Throughout the Process, Keep in Mind:

- The indirect effect of certain employment practices on members of statutorily protected groups.
- Age (over 40)
- Sex
- Marital status
- Pregnancy
- National Origin
- Race
- Religion
- Disability
Other Potential Problems in the Hiring Process

- Americans with Disabilities Act requirements
- More negligent hiring lawsuits
- Trend toward expansion of employment discrimination claims continues
- Increasing use of job testers
Job Descriptions

As a preliminary step to minimize legal risk in hiring, job descriptions should:
- Accurately describe the actual duties of the job presently performed
- Distinguish between essential and marginal functions
- State what must be accomplished, rather than how the job must be done
Obtaining Applications

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

- Ordinarily legal
- **However,**
  - Likely to result in few minority candidates where the existing workforce has few minorities.
  - Supplement with other forms of publication.
Location of Advertisements

- Placed in areas with some ethnic diversity.
- If placed in homogenous areas and the resulting applicant pool has few minorities, the employer could be held liable.
Content of Advertisements

- Ads should not directly or indirectly request applicants be of a certain protected category (age, race, gender, etc.).
- Except where there is demonstrable business necessity.
Use of Employment Agency or Headhunter

- Does not relieve employer from its legal responsibilities
- An employer may be legally liable for the employment agency’s violations
Legal issues are essentially the same for applications and interview questions.
Employers Should Not:

- Ask about the applicant’s race, national origin, sex, religion, marital status, pregnancy, disability, sexual orientation or age
- Ask for information correlated with one of these classifications
  - Could have the effect of excluding applicants based on protected classification.
Best Approach

- Identify the functions of the job
- Consider whether the inquiry is:
  - Job related
  - Consistent with business necessity
- Tailor the inquiry as narrowly as possible
Example: Regular and Timely Attendance Required

∨ *Do ask:*
   - If the applicant has a reliable means to get to and from work.

∨ *Do not ask:*
   - If the applicant has a car.
# Specific Dos and Don’ts

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<tr>
<th>Dos</th>
<th>Don’ts</th>
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<tr>
<td>✓ Name, address, and family status</td>
<td>✓ Economic status</td>
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<tr>
<td>✓ Birthplace</td>
<td>✓ Workers’ Compensation History</td>
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<td>✓ Age</td>
<td>✓ Criminal Record</td>
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<td>✓ Race, color or sex</td>
<td>✓ Veterans</td>
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<td>✓ Religion or creed</td>
<td>✓ Work History</td>
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<td>✓ National origin</td>
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<td>✓ Sexual orientation</td>
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Specific “Dos” and “Don’ts”

- Education
- Height and weight
- Equal Employment Opportunity
- Affirmative Action Requirement
- At-will employment

- False statements and material omissions
An employment application should authorize the employer to:

- Investigate prior employment and educational background.
- Release all cooperating parties from liability.
<table>
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<tr>
<th>Reasons for Background Checks</th>
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<td>✗ It is much easier to reject an unsuitable candidate than to terminate an unsuitable employee</td>
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<td>✗ Such an inquiry can protect the employer from liability under a “negligent hiring” lawsuit</td>
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<td>- Especially if the results are documented.</td>
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Negligent Hiring

- An employer may be liable for negligent hiring when:
  - An employee harms someone while on the job, *and*
  - The employer knew or should have known that such an injury was likely to occur before hiring the individual.
Examining and Verifying Information on Applications and Resumes

- The information the employer should verify will vary depending on the employer’s needs and the position at issue.
- Employer should verify key facts asserted by the applicant.
Contacting Former Employers

- Employers should contact applicants’ former employers
  - Most former employers will verify dates of employment and positions held.
  - A documented effort to gather substantive information provides some protection against a negligent hiring suit.
  - Many former employers are willing to provide substantive information.
    - Practical tip – go beyond HR and contact applicant’s immediate supervisor.
Employers should ask applicants about any criminal convictions. For appropriate positions, the employer should verify the conviction records.

Employers may not ask applicants about arrests.

Applicants with a conviction record should not be excluded automatically.
Consumer Credit Checks

- The Fair Credit Reporting Act creates requirements if a third party is used for background check.
- State counterparts can be broader, e.g. apply even if no third party is used.
Promotions

- An employer can also be held liable for negligent promotion.
- Depending on the position, many of the precautions for hiring should also be taken for promoting employees.

Example
- Greens-keeper promoted to building manager.
Proof of Legal Right to Work in the U.S.

- After accepting a job applicant, an employer is obligated to verify the employee’s eligibility to work in the U.S.
- The employer must apply the requirement uniformly.
Pre-Employment Testing
Medical Testing

- May only be conducted after the applicant has received an offer of employment conditioned on passing a medical exam.
- Where used to screen employees with disabilities, the employer must show the exclusionary criteria are:
  - Job related,
  - Consistent with business necessity, and
  - The performance of essential job functions cannot be accomplished with reasonable accommodation.
Lie Detector Tests

◦ Forbidden by federal law at the hiring stage.
◦ Severely restricted for current employees.
Written Examination

- Many potential hazards
- “Adverse impact” if a disproportionately large percentage of minority applicants fail.
  - Then must “validate” the test by showing it relates to successful job performance.
- EEOC regulations require costly and time-consuming validation before a test can be used.
- Race norming is forbidden under the Civil Rights Act of 1991.
Effective Management of Application Process

- Where feasible, consider a uniform policy that consistently:
  - Rejects oral expressions of interest;
  - Rejects unsolicited resumes and incomplete applications; and
  - Limits the scope of applications to specific open positions.
Effective Management (cont.)

- Consider limiting the period of considering application to the shortest time feasible.
- Consider a selection process that divides applications and openings into numerous discrete employment decisions.
- Do *not* circumvent normal hiring procedures or fail to publicize openings.
Discharge Decisions
Seven Tests of Just Cause

1. Warning
2. Business Purpose
3. Investigation
4. Fairness and Objectivity
5. Substantial Evidence
6. Consistent Application
7. Proportional Discipline
1. Warning

Did the company give the employee warning of the possible or probable disciplinary consequences of his conduct?

- Actual communication of the rules to the employee?
- Orally or in writing?
- If no communication, was the offense serious enough that the employee should be expected to know that such conduct is offensive and punishable?
2. Business Purpose

- Was the company rule or management order reasonably related to the
  - Orderly,
  - Efficient,
  - Safe operation of the business, and
  - the performance that the company might properly expect of the employee?
3. **Investigation**

- Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- Did the employee know with reasonable precision the offense with which s/he is being charged?
3. Investigation (cont.)

- Was the investigation completed *before* its disciplinary decision was made?
- If immediate action was necessary, did management merely suspend the employee pending investigation?
- Did the investigation include an inquiry into any possible justification for the alleged violation?
4. Fairness and Objectivity

- At the investigation was a management official other than a witness the “prosecutor?”
- Did a higher, detached management official perform the judicial role?
- Did the management “judge” question witnesses rigorously and thoroughly?
- Did the “judge” review all documents?
5. Substantial Evidence

- At the investigation, did the management “judge” obtain substantial evidence or proof that the employee was guilty as charged?
- Was the evidence substantial, not flimsy?
- Did the “judge” search out witnesses?
- Did the “judge” originally have reasonable grounds for believing the evidence presented to him by his people?
6. Consistent Application

- Has the company applied its rules, orders and penalties evenhandedly and without discrimination?
- Was there specific scrutiny of “specially protected group” members?
- Has management insured that none of the applicable rules or policies had an adverse effect on any specially protected group?
- If there was an adverse effect, can it be justified as a “business necessity?”
Consistent Application (cont.)

- Have other employees who have previously committed similar misconduct received the same penalty?
- Has any other employee committing the same offense received a lesser penalty?
- If management decided to tighten its rule enforcement, did it inform employees beforehand?
7. Proportional Discipline

- Was the degree of discipline reasonably related to
  - The seriousness of the proven offense, and
  - The employee’s record of service with the company?
Maximizing Victory

- Lock in details
- Allow unionized employees union representation upon request
- Carefully investigate and document witness claims
- Screen and evaluate documents before handing them over to the union
- Have higher management conduct an independent review of documentation
Maximizing Victory (cont.)

- Management’s written recommendation should address all “seven steps” and it should indicate they were all complied with.
- The discharge decision should be given to the employee in writing.
- Keep the termination decision as confidential as possible.
- Attempt to “lock in” the accused’s account again at the grievance hearing.
Questions