



WHAT YOU NEED TO KNOW ABOUT THE DO'S AND DON'TS OF THE EMPLOYEE SELECTION PROCESS

APRIL 16, 2009

Prepared by Laura A. Balson, Esq.

of Golan & Christie LLP

70 W. Madison, Suite 1500, Chicago, Illinois 60602

(312)263-2300



I. ADVERTISING THE POSITION

A. **Do not include any references to protected characteristics in any materials that advertise a job.**

These characteristics include race, national origin, religion, gender, age, sexual orientation, disability, veteran status, marital status, etc. The EEOC has recently revealed that their investigative departments in some local district offices are conducting reviews of popular job posting websites, looking for employers who have posted ads indicating a preference for certain characteristics (i.e. “this position requires a lot of energy and is especially well suited for those right out of college”). If the EEOC finds that an ad may constitute discrimination, they may launch a formal investigation, even without a complaining party.

B. **Do include a description of the requirements and responsibilities of the job, but always make sure that the description is accurate.**

Many employers create job descriptions when looking to hire for a new position but then fail to update the description over time as the position changes. This can present a problem, especially in the context of a dispute over whether an employer is required to make an accommodation to an employee under the ADA – if the employer claims that a task is an “essential job function” but the written job description does not mention that task, the employee is likely to prevail.

C. **Do have qualified legal counsel review all advertisements, job descriptions, and application forms.**

If a claim or lawsuit arises, the written documents that an employer used to market the position and solicit applicants are going to be the key pieces of evidence, so you should make sure that an attorney has reviewed these documents carefully before you distribute them.

II. SCREENING APPLICANTS

A. **Do keep accurate records of all applicants, but don't make notes about characteristics of the applicant that are not directly related to the job requirements.**

When sorting through an unwieldy stack of application forms and resumes, it may be tempting to make notes to help you remember something about and distinguish each applicant (i.e. “talked to on phone, sounded older” or “can't interview on Tuesdays because babysitter not available to watch kids”) but these notes or comments can be evidence of a discriminatory motivation to either refuse an interview or decide not to hire.



B. Don't conduct any pre-employment medical testing until after an offer of employment has been made.

Some employers require physical exams, drug tests, or other similar pre-employment testing in order to clear a new employee for working in a particular position. Such testing is often permissible (depending on the reason for the testing but only when the testing is conducted after the decision to offer the position to the applicant has been made. The applicant may be offered the position and told that it is contingent on successful completion of a test, but the test must be the very last step in the process. Additionally, if the offer is going to be rescinded based on the results, the employer must have a legally permissible reason for doing so, and if so, will typically be required to provide the applicant with the results of the test.

C. Do follow all of the requirements of the Fair Credit Reporting Act if you are going to do reference checks, background checks, or credit checks.

The FCRA has strict procedures that must be followed involving getting written consent from the job applicant, providing notice that an adverse employment action is being taken as a result of something found in a background check, and giving an applicant an opportunity to review and correct any potential errors in a background check that leads to an adverse employment action.

D. Do's and Don'ts if you are going to “google” or otherwise research a job applicant on the web:

1. **Obtain approval from the applicant.** One of the easiest and most effective protections against privacy-based suits resulting from searching social network sites, blogs or other Internet sites is to include on your job application an explicit release authorizing you to conduct these types of searches.
2. **Never try to access any site that you have not been authorized to view.** Do not falsify information or impersonate another individual in order to attempt to obtain access. Read the click-through agreement to make sure you are not inadvertently misrepresenting your purpose in accessing the site.
3. **Look for only job-related information.** The best way to do this is to have defined search criteria. List in a policy the type of information you are looking for when you conduct Internet searches, as well as information you are not looking for. Be prepared to produce evidence of this list in later litigation.
4. **Outsource the search.** You can insulate yourself from liability by engaging the same third-party providers that perform your criminal and other background checks to perform your Internet searches. Again, have them use specifically defined criteria. For example, a third-party provider will often be given a list of the crimes that will exclude a specific category of applicant. Then the third-party provider will simply give the employer “pass” or “fail” information.



III. INTERVIEWING APPLICANTS

PRE-EMPLOYMENT INQUIRIES CHART

NOTE: This chart is a general compendium of permissible inquiries based on federal, state, and local anti-discrimination statutes. It should not be interpreted as representing the law of any one state or municipality and should be used only as a general guidance as to permissible and non-permissible areas of inquiry.

SUBJECT	ACCEPTABLE INQUIRIES	DO NOT ASK
Age	If you require workers to be over 18, you may ask whether an applicant can show proof that they are 18 or older upon hire.	Age. Birth date. Dates of attendance at elementary or high school. Dates of military service. Graduation dates. Questions that tend to identify applicants as 40 years of age or over.
Arrest or criminal record	Questions regarding prior convictions (not arrests) <u>only</u> when accompanied by a statement that such convictions will not absolutely prohibit employment but will be considered only in relation to specific job requirements AND that sealed or expunged criminal records need not be disclosed.	“Have you ever been arrested?”
Birthplace or citizenship	Statement that proof of the applicant’s legal right to work in the U.S. will be required after being hired.	“Are you a U.S. citizen?” Birthplace of applicant (or applicant’s parents or family).
Education	Questions regarding extent of education, degree(s) received, names of schools attended but only when such requirements are clearly related to the job.	Questions regarding dates of attendance at elementary or high school. Graduation dates. Questions regarding ethnic, social, or religious affiliation of schools attended, sororities/ fraternities, etc.



SUBJECT	ACCEPTABLE INQUIRIES	DO NOT ASK
Height or weight	Although height and weight are not, in themselves, protected categories, these types of requirements are frequently interpreted to be a pretext or mask for impermissible criteria. Hiring decisions based upon these characteristics should only be used where the trait being screened for qualifies as a BFOQ (Bona Fide Occupational Qualification). An example of a BFOQ is where the trait is demonstrably related to safe and efficient job performance.	Height. Weight.
Hours of work/ attendance	“Are you able to work overtime?” Questions regarding ability to work the employer’s normal work hours.	Questions regarding number of sick days or leaved under the FMLA taken at previous employers.
Military service	Questions regarding relevant experience gained during military service.	Questions regarding type of discharge (except dishonorable). Questions regarding reserve duty obligations. Questions regarding service in foreign military.
Name	“Have you ever used any other name?” “Is additional information, such as an assumed name, necessary in order to check job references?”	“What is your maiden name?”
National origin	When languages other than English are relevant to the job applied for: “Do you speak [insert language]?”	Questions requiring applicant to identify national origin, ancestry, or nationality. “What is your first/native language?”



SUBJECT	ACCEPTABLE INQUIRIES	DO NOT ASK
Organizations/ activities	It is permissible to ask applicants to list all job-related organizations, clubs, or professional societies to which they belong, but they should be told to omit those that would identify their race, color, religion, sex, national origin, age, disability, or sexual orientation.	“Do you belong to any social or political groups?”
Physical/mental disability	It is permissible to describe the various functions of the job and then to inquire whether the applicant can perform the essential functions of the job, with or without reasonable accommodation. Asking the applicant to describe performing certain functions.	“Do you have any impairments or disabilities that may affect your ability to perform the job applied for?” “Have you ever been treated for drugs or alcohol addiction?” “How many days of work did you miss last year because of illness?” Questions regarding an applicant’s general health, medical conditions, illness, or disabilities or receipt of benefits for disability or worker’s compensation.
Qualification/previous work experience	Questions related to previous experience and/or skills that are relevant to the job applied for, names and addresses of former employers, dates of prior employment, and reason(s) for leaving previous employer.	“How much and what kinds of insurance do you have?” Questions related to overly-inflated experience requirements that are not strictly job related.
Race or color	Statement that a photograph may be required after hiring decision. NOTE: Data for OFCCP (Office of Federal Contract Compliance Programs) affirmative action compliance or EEO record-keeping should be recorded and maintained separately from the application.	Questions requiring applicant to identify race, color, complexion, color of skin, hair or eyes. Questions requiring applicant to identify attitudes about working with, supervising, or being supervised by a person of another race.



SUBJECT	ACCEPTABLE INQUIRIES	DO NOT ASK
References	Request that applicants list those persons willing to provide personal and/or professional references.	Questions directed to applicant's former employer(s) or personal references that elicit information regarding applicant's race, color, religion, creed, sex, age, national origin, or disability.
Relatives/anti-nepotism policies	<p>Statement of employer's anti-nepotism policy. (Even though this is not an inquiry, the only way that an applicant can be informed that such a policy exists, and that it may be a disqualifier, is by a statement.)</p> <p>Questions regarding spouse or relatives working for competitors when necessary to protect company secrets.</p>	Questions that ask an applicant to identify relatives or close friends working for the employer.
Religion	<p>Statement of the employer's regular working hours, days, or shifts and whether the applicant can work this schedule.</p> <p>Questions regarding religious days of observance or religious affiliation but only when such is demonstrably related to job performance.</p>	<p>Religion of applicant.</p> <p>"Do you attend church? Which one?"</p> <p>Requirement that applicants include a member of the clergy as a personal reference.</p>
Residence	Address	<p>"Do you own or rent your home?"</p> <p>"Do you have any foreign residences?"</p> <p>"How long have you lived at your present residence?"</p> <p>"Do you live with anyone?"</p>
Sex	Since it is generally difficult to prove that sex is demonstrably related to job performance, questions intended to elicit the applicant's sex (on an application) should generally be avoided.	<p>"Are you married or divorced?"</p> <p>"Do you plan to get married or start a family?"</p> <p>"What are your child care arrangements?"</p> <p>Questions inquiring whether an applicant's spouse will allow him or her to travel.</p>



IV. MAKING A JOB OFFER

A. **Do provide a written offer letter to the applicant that you have selected for the position.**

A good offer letter should clearly state the employee's start date, compensation (written in terms of a hourly rate or salary per payroll period, NOT in terms of an annual amount), any benefits, the employee's status as either FLSA exempt or non-exempt (WARNING – this classification is frequently made incorrectly and should always be done with the advice of legal counsel), and a reference to any other important documents that the employee should read before beginning the position, such as an employment agreement or an employee handbook or company policy manual. The letter should also state whether the offer is contingent on meeting any other requirements (i.e. providing proof of authorization to work in the U.S.).

B. **Don't make any guarantees about job security.**

Especially in difficult economic times, new hires may be looking for certain guarantees about how long their position will last. Though it can be tempting to assure the employee about the company's stability, or make representations about how sure you are that this position will be a long lasting one, you must be very careful to avoid such statements because they could jeopardize the at will nature of the employment relationship. Additionally, it is important to state in writing as often as possible (including the offer letter, employment agreement, handbook, etc.) that the employee has been hired as an "at will employee" which means that either the employee or the company can terminate the relationship at any time, for any reason or no reason, with or without cause or notice.