

Investigating Job Applicants

Employment Applications and Job Interviews

Both federal and state laws limit what questions an employer may ask prospective employees on a job application or during a job interview. Some of these restrictions protect individual privacy, while others are meant to prevent discrimination in the hiring process. As a general rule of thumb, questions posed to prospective employees should focus on confirming the applicant's identity and assessing the applicant's ability to successfully perform the essential job duties of the position in question.

To this end, job applications should require the individual's full name and current address. In addition, an employer should consider requesting all residential addresses for the past 10 years in order to permit a full background check. Educational information, including the name of any school attended, the years of attendance and degrees or courses of study, all should be explored, even though the job in question may not require a certain education, for purposes of supplying the employer with further means of confirming the applicant's identity and general stability. In this regard, employers should be careful to avoid a broad-based policy of requiring all new hires to have a defined level of education, as any such policy may have a disparate impact on minorities in violation of equal employment opportunity laws.

The application also should request an employment history, listing the names and addresses of previous employers, job titles, dates of employment, supervisor references, and reasons for leaving. Every job application should contain carefully tailored questions about whether the individual has ever been convicted of a criminal offense; the date, place, and nature of the crime; and a statement that an affirmative answer will not automatically disqualify the applicant from consideration for employment. Whether the applicant currently uses illegal drugs or has done so within the recent past also is a legitimate inquiry. Every employment application also should request references who are neither past employers nor relatives, and include a release of claims against those references.

In addition to requiring the above information and any other appropriate job-related information, the employer should request that every applicant authorize the employer to investigate the applicant's employment, educational, and personal references. Applicants also should be asked to confirm the accuracy and completeness of the information provided on the application and should be required to certify their understanding that the falsification or misrepresentation of information, whether or not material, will result in disqualification of the applicant from consideration for employment or disciplinary action up to and including termination of employment.

Finally, job applications should not be processed unless they are fully completed. Any and all gaps, such as gaps in employment history, should be explained and all

information fully provided *before* the applicant is interviewed or during the first interview.

Date of Birth Information

Federal and most state fair employment statutes prohibit an employer from inquiring about a job applicant's age. The reason for this prohibition is to protect job applicants from age discrimination, or more specifically, to make sure that older applicants are judged on their abilities rather than their age.

In terms of an employment application, this means that employers should not ask for an applicant's age or date of birth either directly or indirectly. For example, an employer should not ask applicants to identify the date or year that they graduated from high school as this information is considered an accurate indication of the age.

Social Security Numbers

Neither federal nor state law currently prohibits an employer from asking for social security numbers on job applications. It is important to note, however, that any benefit of obtaining social security numbers early on in the hiring process is likely to be outweighed by the burdens of maintaining the confidentiality and security of the information.

In recent years, more than 20 states have enacted legislation mandating that businesses notify state residents of security breaches involving sensitive, personally identifiable information, including social security numbers. The cost of complying with these statutes can be significant. In addition, the damage to an employer's business in the event it is required to provide notice of a security breach can be tremendous. For these reasons, we recommend that employers eliminate the unnecessary collection of personal information. With respect to obtaining an applicant's or employee's social security number, we urge employers to wait until they have a legitimate business need for the information. For example, social security numbers are needed in order to conduct a background check, and routinely are collected on the background check consent form. Similarly, on or before the first day of employment the employee will be required to provide the employer with a signed W-4 form containing the employee's social security number.

Physical Ability to Perform the Job

The Americans With Disabilities Act strictly prohibits pre-employment inquiries that are likely to elicit information about the existence, nature, or severity of a disability. For example, an employer may not inquire as to whether an applicant needs reasonable accommodation to perform the job. An employer may ask whether the applicant is able to perform specific job-related functions "either with or without accommodation," however. An employer also may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, he or she will be able to perform job-related functions.

Past and Current Drug Use

Individuals who once abused illegal drugs but no longer use them are protected from discrimination under the Americans with Disabilities Act (“ADA”). Accordingly, employers are prohibited from asking about a job applicant’s or employee’s past drug use.

Moreover, because questioning about the lawful use of drugs or alcohol is a “medical inquiry” under the Act, questions about the applicant’s current, lawful activities in this respect (e.g., taking prescription drugs) may occur only at the post-offer, pre-employment stage. Any information obtained must be used consistently with the requirements of the ADA, such that any adverse action is well grounded in reasons that are “job-related and consistent with business necessity,” with appropriate consideration of possible reasonable accommodations. It is important to note that the ADA does not protect current users of illegal drugs. For this reason, an applicant may be questioned about his or her current illegal use of drugs.

Contacting Friends, Neighbors, Former Teachers, or Relatives

An employer should only contact references identified by the applicant and then only with the applicant’s consent. Contacting other individuals may expose the employer to claims for invasion of privacy. Additionally, conversations with friends, neighbors, and relatives of the applicant are inherently more likely to involve topics beyond the employer’s legitimate need to know. Conversations with former teachers may be unnecessary in cases where the applicant has consented to the release of school records but otherwise present a lesser risk of exposure to liability if limited to a discussion of the applicant’s academic performance and situations in which such academic performance is important to the job.

Contacting Former Employers and Coworkers

An employer should ask for an applicant’s written consent before contacting former employers and coworkers. If the applicant refuses such consent, the employer should ask why and may wish to decline further consideration of the applicant. A court is likely to find that job applicants have diminished expectations of privacy with regard to investigation of their prior employment histories; accordingly, this form of background investigation probably entails the least likely risk of liability.

Inquiries directed to former employers should include not only verification of dates of employment and positions held, but also information concerning such factors as the employee’s reliability; tendency, if any, to engage in violent conduct; and any instances of insubordination, dishonesty, or other potential problem areas.

Many employers follow a policy of not providing references beyond the verification of dates of employment, position held, and most recent pay rate. To protect itself from lawsuits by coworkers, clients, customers, or visitors who may be harmed by a prospective employee, an employer must nevertheless document its reasonable attempts to obtain relevant information from prior employers that may have prevented such harm.

Another practical approach to obtaining information from references is to encourage networking by human resources employees with their colleagues and counterparts in

the same industry, trade, or profession. Personal relationships among human resources personnel often result in greater accessibility to information.

Many states have enacted statutes designed to protect employers from defamation lawsuits so long as the employer responds to reference requests in good faith and without malice.

Questions That Should Be Asked of References

The first rule of thumb is that an employer should avoid asking references any questions that it could not ask the applicant under applicable equal employment opportunity laws. Questioning may, and should, reach beyond the typical verification of employment dates and positions held, to address information such as the employee's reliability, work performance, involvement in any violent or harmful conduct, and any instances of insubordination, dishonesty, or other potential problem areas related to the employee's former conduct in the workplace. Where any reference offers to provide inappropriate personal information, such as the applicant's marital or family difficulties, irrelevant financial troubles, or mental or physical disabilities, an employer must exercise extreme caution by focusing the inquiry back on whether the personal problems have in any way interfered with the applicant's employment or ability to conduct everyday affairs in an honest, reliable manner without resort to harmful or violent conduct.

To facilitate this process, employers may wish to consider forwarding to individuals identified as references a copy of the applicant's consent to the release of information as well as a release of claims against the references. All information provided by references should be well documented and subsequently used only in accordance with the various legal constraints.

Obtaining Information about an Applicant's Educational History

An employer should review an applicant's educational history even when the position applied for does not require a certain type or level of education. This is because information about an applicant's education, including the name of any school attended, the years of attendance and degrees or courses of study, is important for purposes of providing the employer with a means of confirming the applicant's identity and general stability. This information can and should be obtained directly from the applicant on the job application and during the job interview.

An employer may confirm some of the information received from the applicant by contacting the educational institution directly, although the Family Educational Rights and Privacy Act ("FERPA"), 29 U.S.C. § 1232g, limits what information may be released without authorization from the student (or a parent in the case of a minor student). FERPA is a federal law that protects the privacy of student education records and applies to schools that receive funds under an applicable program of the United States Department of Labor. Under FERPA, a school may release "directory information," which is defined to include name, address, dates of attendance, degree earned and activities, without the student's consent unless the student has given written notice that the information may not be released. Transcripts, recommendations, discipline records and financial information are confidential and may never be released to an employer without the student's consent.

Obtaining Information about an Applicant's Criminal History

Consideration of an applicant's criminal history is essential given an employer's duty to exercise reasonable care in the hiring process and the potential for liability arising from the negligent hiring of an unfit employee. Employers should learn about an applicant's criminal history by asking appropriate inquiries on job applications and during the initial job interview. In addition, criminal records are generally a matter of public record and can be accessed by employers at the local courthouse. Certain records are not open to the public, however, such as most juvenile records, expunged records and sealed records. Statewide criminal databases often have rules limiting disclosure of criminal history information and may require the written consent of the subject of the record.

It is important to note that the Equal Employment Opportunity Commission ("EEOC") takes the position that hiring policies that disqualify job applicants based upon criminal convictions may have an unlawful "disparate impact" on minorities under Title VII. "Disparate impact" can result from the application of facially neutral practices or policies, regardless of the employer's motivation. To ensure that the information is clearly "job-related," the EEOC has directed employers to evaluate conviction information on an individualized basis with respect to: 1) the nature and gravity of the offense, 2) the relationship between the job duties for the position in question and the offense, and 3) the date of the conviction (that is, how old it is). A blanket policy disqualifying any applicant with a felony conviction would almost certainly run afoul of this broad mandate. Moreover, the EEOC and most state laws prohibit employers from considering records of arrest that did not lead to convictions.

In addition, several states have laws that specify whether and to what extent criminal history information may be considered in the hiring process. For example, under Massachusetts law, an employer may not inquire into a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace. The California Labor Code prohibits employers from *asking* job applicants to disclose information concerning a referral to, and participation in, any pretrial or posttrial diversion program, and from *using* such information, regardless of the source, as a factor in determining any condition of employment. The Labor Code has a similar restriction regarding certain marijuana-related offenses that are more than two years old.

In Georgia, records relating to a first offender who has been discharged without a court adjudication of guilt, may not be used to disqualify an individual from public or private employment.

Hawaii is another state that has special rules regarding criminal history inquiries. In Hawaii, an employer may inquire about and consider an individual's criminal conviction record when making decisions concerning hiring, termination, or the terms, conditions or privileges of employment, provided that the conviction record bears a rational relationship to the duties and responsibilities of the position. Inquiry into and consideration of conviction records for prospective employees may only take place *after the applicant has received a conditional offer of employment*. The conditional offer may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position. At least three other states have similar job-relatedness laws.

Finally, several states require that special language and restrictions be included in job applications that request criminal history information. Employers should consult counsel to ensure that their criminal history inquiries comply with applicable state laws.

Obtaining Information from National Criminal Databases

The increasing demand for pre-employment screening has fostered the growth of private criminal history databases. These private databases combine criminal history information from a number of public record sources, including state courts and corrections departments, sometimes on a nationwide basis.

Direct access to such databases typically is limited to consumer reporting agencies ("CRAs"), such as LexisNexis® Authentication & Screening. The databases are one tool available for use by CRAs to enhance the efficiency of their search capabilities, especially for more expansive, multi-state searches. The databases have fundamental limitations that must be accounted for when used for pre-employment screening purposes, however. The databases are compiled from different public records sources. Not all sources include the same information or level of detail. Therefore, some database searches may yield incomplete, and therefore unreliable, information. Furthermore, records from some sources may be regularly updated whereas other records are not. The federal and state fair credit reporting laws prohibit CRAs from reporting criminal history and other information to end-users for employment purposes, unless the agency maintains "strict procedures" to ensure the records are complete and up to date. Although employers do not have to maintain such procedures, clearly employers have a strong interest in considering only reliable and complete criminal history information.

Obtaining Information from the Department of Motor Vehicles

A review of an applicant's driving record is essential, particularly when the applicant is applying for a position that involves driving. Such records allow an employer to confirm the status of the applicant's driver's license and to review the applicant's driving history, including tickets and accidents. What many employers overlook, however, is that driving records can be an invaluable and inexpensive source of information regarding all prospective employees, even those applying for positions without driving responsibilities. For example, driving records may reveal that the applicant has missed court appearances or failed to pay tickets and, therefore, may not be reliable. They also may reveal information about an applicant's criminal history, such as DUIs and citations for reckless driving. Of course, such information only may be considered in accordance with applicable state law restrictions.

Generally speaking, a person's driving record is public information and can be disclosed upon request. Accordingly, employers may access records relating to vehicular accidents, driving violations and driver's status. The federal Drivers Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721 et seq., as amended, however, prohibits the dissemination or disclosure of certain personal information contained in a person's driving record. "Personal information" is defined as information that identifies an individual, including the individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information. Personal information in an applicant's

driving record may be obtained for employment purposes only with the applicant's consent. The one exception is for applicants who are licensed commercial drivers.

Most states have developed forms to comply with DPPA. These forms are generally available from the website of the state departments of motor vehicles.